90-1988 (1)

Supreme Court, U.S.
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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

ANTOINETTE RUSSO and MILDRED MALONEY,
Petitioners,

vs.

CARL MASSULLO, BEAVER TOWNSHIP, JOHN DOE 1-7, SCOTT POHLMAN, CARL FROST, RICK MARTIN and KEN FROST,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STEPHEN W. GARD
Counsel of Record
1801 Euclid Avenue
Cleveland, Ohio 44115
(216) 687-2263

ORVILLE E. STIFEL II
1500 Leader Building
Cleveland, Ohio 44114
(216) 696-4122

Counsel for Petitioners

QUESTIONS PRESENTED

1. Whether law enforcement officials who exercise no lawful discretion in conducting a warrantless search and seizure, but instead violate a legally binding ministerial duty, are entitled to qualified immunity in an action brought pursuant to 42 U.S.C. §1983?

2. Whether qualified immunity entitles law enforcement officials to summary judgment when there is a material issue of fact whether they actually knew, or reasonably should have known, that they had had no probable cause to conduct a warrantless search and seizure?

3. Whether law enforcement officials who conduct a warrantless search and seizure with no lawful authority, under no exigent circumstances and in direct violation of an injunction are entitled to qualified immunity in an action filed pursuant to 42 U.S.C. §1983?

4. Whether Pembauer v. City of Cincinnati, 475 U.S. 469 (1986), establishes that the unconstitutional conduct of the final and ultimate policymaker itself constitutes municipal policy sufficient to impose liability on the governmental entity under 42 U.S.C. §1983?

LIST OF PARTIES

Petitioner Antoinette Russo, a law-abiding grandmother with no previous arrests or liquor violation citations, is the owner of the Stagecoach Restaurant and Lounge, a small neighborhood establishment located in rural Beaver Township, Ohio.

Petitioner Mildred Maloney, an elderly diabetic with no previous arrests, was employed as a cook at the Stagecoach Restaurant and Lounge.

Respondent Carl Massullo is the Acting Chief of Police of Respondent Beaver Township. Respondent Massullo was the "final policymaker" for the Respondent Township in regards to day-to-day law enenforcement matters. On April 16, 1987

Respondent Massullo participated in the planning and execution of an armed raid on the Stagecoach Restaurant & Lounge for the purpose of seizing two video games lawfully maintained on the premises. Respondents Frost, Martin and Frost, accompanied by another 5 - 8 law enforcement officials (Respondents John Doe 1-7), also participated in this video game raid.

Respondent Scott Pohlman, an agent employed by the Ohio Department of Liquor Control, participated in the planning and execution of the armed "raid" and video game seizure at the Stagecoach Restaurant & Lounge and thereafter instituted criminal proceedings against Petitioners which were later dismissed on the ground that there was no evidence to support them.

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IN THE
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Respondents.

PETITION FOR WRIT OF CERTIORI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners Antoinette Russo and Mildred Maloney respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit filed on March 5, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, Case Nos. 90-3240 and 90-3241, is unreported and is reproduced here as Appendix A.

The opinion of the United States District Court for the Northern District of Ohio, Case Nos. C88-0928Y and C88-0929Y, is unreported and is reproduced here as Appendix B.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its opinion and judgment on March 5, 1991. This petition was timely filed within ninety days of that date.

The jurisdiction of this Court to re-

view the opinion and judgment of the United States Court of Appeals for the Sixth Circuit is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves 42 U.S.C. §1983 which provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

This case also involves the fourth amendment to the United States Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

Finally, this case involves §1 of the fourteenth amendment to the United States Constitution, which provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In 1985 Petitioner Antoinette Russo assumed ownership of the Stagecoach Restaurant & Lounge as a result of her divorce from her abusive ex-husband. She agreed to have two video draw poker games installed after being shown an accurate copy of an injunction which absolutely prohibited the Respondents, and each of them, from "seizing, impounding or confiscating" such video games in Mahoning County, Ohio. Garono v. State, Case No. 85 CV 315 (Mahoning Comm. Pleas 1985), aff'd, 85 CA 44 (Mahoning App. 1985), aff'd, 37 Ohio St.3d 171 (1988). At no time thereafter did any law enforcement official, includ- Respondents, advise Petitioner Russo that they would not abide by the injunction or that they had any reason to believe that the games were unlawful.

The Garono injunction was issued in response to a long history of harassment of the possessors of video games in Mahoning County by the Respondents. In 1982 the Ohio Department of Liquor Control conceded that the mere possession of video draw poker games was not violative of Ohio law or the regulations of the Ohio Department of Liquor Control. Mills-Jennings of Ohio, Inc. v. Ohio Department of Liquor Control, 70 Ohio St.2d 95 (1982). Rather than cease the seizure of the video games, Respondent Pohlman and other liquor agents merely altered their enforcement methods:

> [T]he agents manifested a belief that the law . . . prevented them from seizing the draw poker machines "on sight", but that the machine could be seized if they obtained a payoff on that machine. With this in mind, the agents frankly admitted that they set out to obtain payoffs. . . . After taking due note of the demeanor of each of the

> State's witnesses, the evasive manner in which they answered questions, the inconsistencies in their testimonies, and their frank admissions that the sole purpose of their "undercover investigations" was to justify a subsequent seizure of the machines, the Court concludes that the testimony offered by the state amounts to nothing more than exaggerations and distortions. . . .

State v. Skalada, Case No. 84-1976 (Youngstown Muni. Ct. 1984), at p. 1 n.1. (Emphasis added).

When the owner of the video games successfully secured an injunction in 1985 prohibiting Respondents, and each of them, from "seizing, impounding or confiscating" the machines, Respondents stipulated that seizure of the video games was wholly unnecessary for any proper law enforcement purpose. Garono v. State, 37 Ohio St.3d at 172.

On February 2, 1987, Respondent Massullo wrote a letter to the Department of Liquor Control, stating, admittedly with no basis in fact, that there was illegal gambling occurring at the Stagecoach Restaurant & Lounge. At this time, Respondent Massullo knew that recent undercover investigations by officers of his own police department had discovered no illegal activities at the Stagecoach.

On the basis of this letter Respondent Pohlman, who alone had seized as many as 500 video games despite the Ohio Supreme Court's decision in Mills-Jennings, supra, and the Garono injunction, began an undercover investigation at the Stagecoach Restaurant & Lounge on March 5, 1987. The investigation concluded on April 4, 1987. Respondent claimed to have received a pay-

off for playing the video games at the Stagecoach, but this testimony was rebutted by his own contemporaneous handwritten records which demonstrated that he neither played any video game nor received a payoff. Instead, his own records reveal that he purchased, and presumably consumed, an average of $18.00 worth of liquor daily.

Thereafter Respondents Pohlman, Massullo, Frost, Martin and Frost met and agreed to conduct an armed raid on the Stagecoach Restaurant & Lounge expressly for the purpose of seizing the two video games in violation of the Garono injunction.

On the evening of April 16, 1987 Respondents, acting without a warrant or any other lawful authority, conducted a massive armed raid on the Stagecoach Restaur-

ant & Lounge. At approximately 9:30 p.m. Respondents, accompanied by another 5 - 8 armed officers, entered the Stagecoach, pointed shotguns at everyone inside and demanded that Petitioners and all others raise their hands above their heads. Respondents held the Petitioners and the customers hostage on the premises for two (2) hours, searched them each one or more times, twice emptied the contents of Petitioner Russo's purse, refused to allow them to use the restroom without a police escort, required at least one customer to partially disrobe, beat another customer in the parking lot, forcibly ejected customers from the premises without allowing them to pay for food and beverage which they had consumed and refused to permit other customers to enter the premises. During this two hour siege Respondents re-

peatedly stated that no warrant was necessary to authorize their conduct.

Respondent Massullo, the ultimate and final policymaker for Respondent Beaver Township, was present during the raid and commended his officers for their performance. Respondent Pohlman later admitted that the Respondents were "all kind of there together", "there were no clear bosses" and "it [was] more of a joint thing."

At the conclusion of this armed raid Respondents seized the two video games in direct violation of the Garono injunction. Criminal charges against Petitioners Russo and Maloney for gambling and operating a gambling house were later dismissed on the ground that there was no evidence to support them. Respondent Pohlman testified

in the criminal proceedings and, if his testimony that he received a payoff had been believed that would have constituted some evidence to support his allegations. Thus, the court necessarily discredited the testimony of Respondent Pohlman. No other arrests and no evidence of any illegal activity was discovered by Respondents as a result of the April 17, 1987 raid.

Petitioners Russo and Maloney each filed a Complaint in the District Court on April 14, 1988, alleging causes of action under 42 U.S.C.§1983 for violations of the fourth and fourteenth amendments to the United States Constitution. Each Petitioner filed an Amended Complaint on October 17, 1988. The District Court consolidated the cases because they arose out of

the same incident.

Following full discovery, the District Court granted summary judgment to all Respondents on February 16, 1990. The District Court stated that "the defendants should not be commended for ignoring an injunction against them" but nevertheless held that the disputed statements of Respondent Pohlman that he had received a payoff was sufficient to establish probable cause for the seizure and arrests and that the actions of the Respondents were reasonable as a matter of law under the circumstances as an administrative inspection of a liquor establishment. Finally, the District Court held that there was no established municipal policy or custom by Respondent Beaver Township upon which to base liability.

Respondents each filed timely notices of appeal in the United States Court of Appeals for the Sixth Circuit, which consolidated the cases.

The Court of Appeals rendered its opinion and judgment on March 5, 1991. Ignoring the warrant requirement of the fourth amendment, the Court of Appeals held that the "test for the entry itself and all subsequent conduct is whether these are reasonable." The Sixth Circuit Court of Appeals then refused to hold that Respondents' knowing violation of the injunction, absolutely prohibiting the seizure of the video games, rendered their actions per se unreasonable or stripped them of qualified immunity.

Finding that the seizure and arrests were not justified, statutorily or consti-

tutionally, as an administrative inspection and identifying no exigent circumstances, the Court of Appeals nevertheless partially affirmed the grant of summary judgment for Respondents Massullo, Frost, Martin and Frost on the sole ground that they were relying on the statement of Respondent Pohlman that he had received a payoff more than 12 days earlier. The grant of summary judgment for Respondent Pohlman was reversed, however, on the ground that he was entitled to no qualified immunity if a jury found that his statement regarding the alleged payoff was a knowing or reckless falsehood.

The Court of Appeals also held that the District Court's grant of summary judgment to Respondents Pohlman, Massullo, Frost, Martin and Frost, based on quali-

fied immunity, was improper regarding the the reasonableness of the scope and manner of the search.

Finally, the Court of Appeals affirmed the grant of summary judgment for Respondent Beaver Township. Finding that there was sufficient evidence from which a jury could conclude that Respondent Massullo was the final and ultimate policymaker for Respondent Beaver Township, the Court of Appeals held that, in addition to the unconstitutional conduct of the final municipal policymaker, the Petitioners had failed to prove some additional "municipal policies and customs" which caused the constitutional injuries to Petitioners.

This timely petition follows.

REASONS FOR GRANTING THE WRIT

I. LAW ENFORCEMENT OFFICIALS WHO EXERCISE NO LAWFUL DISCRETION IN CONDUCTING A WARRANTLESS SEARCH AND SEIZURE, BUT INSTEAD VIOLATE A LEGALLY BINDING MINISTERIAL DUTY, ARE ENTITLED TO NO QUALIFIED IMMUNITY IN AN ACTION BROUGHT PURSUANT TO 42 U.S.C. §1983

In Harlow v. Fitzgerald, 457 U.S. 800 (1982), this Court established the general standard governing the qualified immunity available to government officials in an action brought under 42 U.S.C. §1983:

> [G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id. at 818.

Thus Harlow emphasized the fundamental importance of the distinction between discretionary and ministerial functions of government officials for purposes of qualified immunity: "Immunity generally is available only to officials performing discretionary functions." Id. at 816.

Perhaps because this language was not essential to the holding in Harlow, a significant conflict has developed between the federal circuit courts of appeal as to whether qualified immunity is available to a government official who is exercising no discretionary function, but rather acting in violation of a ministerial duty. Thus, in the instant case the Sixth Circuit joined the Fourth, Seventh and Eighth Circuits in granting a qualified immunity defense to a government official who was ex-

ercising no lawful discretion, but instead violating a clear ministerial duty. See, e.g., Withers v. Levine, 615 F.2d 158 (4th Cir.), cert. denied, 449 U.S. 849 (1980); Coleman v. Frantz, 754 F.2d 719 (7th Cir. 1985); McIntosh v. Weinberger, 810 F.2d 1411 (8th Cir. 1987).

In contrast, the First, Third, Fifth, Ninth and Eleventh Circuits have endorsed and applied the distinction, finding that a government official is entitled to qualified immunity only if engaged in a discretionary function rather than the violation of a ministerial duty. See, e.g., Conte v. Collins, 898 F.2d 284 (1st Cir. 1990); People of Three Mile Island v. Nuclear Regulatory Commissioners, 747 F.2d 139 (3d Cir. 1984); Gagne v. City of Galveston, 805 F.2d 558 (5th Cir. 1986); F.E.

Trotter, Inc. v. Watkins, 869 F.2d 1312 (9th Cir. 1989); Harrell v. United States, 875 F.2d 828 (11th Cir. 1989). See also Burris v. Mahaney, 716 F.Supp. 1051, 1064 (M.D. Tenn. 1989); Front Royal and Warren County Industrial Park Corp. v. Town of Front Royal, 708 F.Supp. 1477, 1481 (W.D. Va. 1989); Woods v. White, 689 F.Supp. 874 (W.D. Wisc. 1988); Breault v. Chairman of Board of Fire Commissioners, 401 Mass. 26, 513 N.E.2d 1277 (1987), cert. denied sub. nom. Forastiere v. Breault, 108 S.Ct. 1078 (1988).

The public interest demands that this conflict between the federal courts of appeal be resolved by an explicit holding that a government official who violates a clear ministerial duty forfeits any claim to qualified immunity. As a matter of

both history and public policy, "the exercise of discretionary judgment by the state official is the cornerstone to the defense of qualified immunity." Avery v. Powell, 695 F. Supp. 632, 642 (D. N.H. 1988).

On its face 42 U.S.C. §1983 contains no immunities whatsoever for government officials who violate the constitutional rights of citizens. The judicial creation of official immunities in §1983 actions is justified by the fact that the drafters of the statute intended that it be interpreted consistently with the immunities recognized by the common law. See, e.g., Scheuer v. Rhodes, 416 U.S. 232 (1974); Pierson v. Ray, 386 U.S. 547 (1967); Tenney v. Brandhove, 341 U.S. 367 (1951).

The common law at the time of the

drafting of 42 U.S.C. §1983 granted immunity from civil liability only to government officials whose conduct involved some exercise of discretion. See, e.g., Amy v. The Supervisors, 78 U.S. (11 Wall.) 136, 138 (1870); Kendall v. Stokes, 44 U.S. (3 How.) 87, 98 (1845). Thus, fidelity to the intent of the drafters of 42 U.S.C. §1983 requires that a government official whose conduct is violative of a clear ministerial duty be afforded no qualified immunity.

Public policy also requires that a government official who violates a ministerial duty not be permitted to assert a qualified immunity defense in a §1983 action. The doctrine of qualified immunity represents a carefully crafted balance between "the importance of a damages remedy

to protect the rights of citizens . . . [and] 'the need to protect officials who are required to exercise their discretion . . . .'" Harlow v. Fitzgerald, 457 U.S. at 807, quoting Butz v. Economou, 438 U.S. 478, 506 (1978).

A failure to resolve the conflict between the circuit courts of appeal by explicitly limiting the availability of the qualified immunity defense to government officials who are exercising a discretionary function would uncouple the doctrine of qualified immunity from its underlying rationale:

> The basic idea behind good faith qualified immunity is that discretionary acts of public officers must not be unduly deterred by the threat of liability. To the extent that the officer has no choice but to do a certain act, such as when a state requires him to perform some ministerial duty, this underlying

rationale is irrelevant.

Burris v. Mahaney, 716 F.Supp. 1051, 1064 (M.D. Tenn. 1989).

The limitation of qualified immunity in §1983 actions to official conduct involving discretionary functions also is necessary to maintain symmetry with other immunities recognized by this Court. Thus, federal officials are not entitled to immunity from state-law tort liability unless their conduct is discretionary in nature. Westfall v. Erwin, 484 U.S. 292 295 (1988)("[A]bsolute immunity for non-discretionary functions finds no support in the traditional justification for official immunity."). Similarly, there is no immunity under the Federal Tort Claims Act unless the defendant was engaged in a discretionary function. See, e.g., Berko-

vitz v. United States, 486 U.S. 531 (1988). It truly would be anomalous for a government official who violates a citizen's constitutional rights to be entitled to greater immunity than one who merely commits a common law or statutory tort.

The instant case is an ideal vehicle for the recognition of the principle that a government official who violates a ministerial duty is entitled to no qualified immunity in an action brought pursuant to 42 U.S.C. §1983. In this case the Respondents knowingly violated an injunction which absolutely prohibited them from "seizing, impounding or confiscating" the video games possessed by Petitioner Russo. Garono v. State, Case No. 85 CV 315 (Mahoning Comm. Pleas 1985), aff'd, 85 CA 44 (Mahoning App. 1985), aff'd, 37 Ohio St.3d

171 (1988).

This injunction was issued only after Respondents stipulated that the seizure of these games was wholly unnecessary for any proper law enforcement purpose. Id. at 172. This injunction was entered to protect the Petitioners' property interest in the possession of the games and their liberty interest in being free of unlawful and unconstitutional seizures of the games, and the seizures and searches of their persons incident thereto. The injunction specified the precise conduct which the Respondents were prohibited from engaging and was absolute in its terms, leaving no room for any exercise of discretion whatsoever by the Respondents. The illegal and unconstitutional conduct prohibited by the Garono injunction was

the precise conduct in which Respondents engaged on April 17, 1987 when they conducted an armed raid, held the Petitioners hostage at gunpoint for two hours and then seized the video games.

The most basic ministerial duty known in American jurisprudence is the obligation of all persons, regardless of status or station in life, to obey an injunction until such time as it is vacated by orderly and proper judicial proceedings. No person, not even a government official, possesses any discretion whatsoever to violate an injunction. See, e.g., Walker v. City of Birmingham, 388 U.S. 307 (1967); United States v. Shipp, 203 U.S. 563 (1906); State ex. rel. Beil v. Dota, 168 Ohio St. 315, cert. denied, 360 U.S. 912 (1958).

Petitioner respectfully submits that this important issue, whether a government official who violates the most basic ministerial obligation of American jurisprudence should be entitled to qualified immunity, is worthy of authoritative resolution.

II. QUALIFIED IMMUNITY DOES NOT ENTITLE LAW ENFORCEMENT OFFICIALS TO SUMMARY JUDGMENT WHEN THERE IS A MATERIAL ISSUE OF FACT WHETHER THEY ACTUALLY KNEW, OR REASONABLY SHOULD HAVE KNOWN, THAT THEY HAD NO PROBABLE CAUSE TO CONDUCT A WARRANTLESS SEARCH AND SEIZURE

The doctrine of qualified immunity, as reformulated in Harlow v. Fitzgerald, 457 U.S. 800 (1982), holds that no liability will attach unless the government official "violate[d] clearly established

. . . rights of which a reasonable person would have known." Id. at 818. Harlow expressly endorsed the first prong of the pre-existing standard whereby the government official would be held liable if he "knew or reasonably should have known that the action he took . . . violate[d] the constitutional rights of the [plaintiff] . . . ." Id. at 815 (emphasis in original), quoting Wood v. Strickland, 420 U.S. 308, 322 (1975).

At the time Harlow was decided it was recognized that a serious ambiguity remained unresolved: whether a government official who has actual knowledge that he is violating the constitutional rights of the plaintiff is entitled to qualified immunity. Id. at 821 (Brennan, Marshall and Blackmun, J.J., concurring). Later cases

have not resolved this ambiguity. Compare Davis v. Scherer, 468 U.S. 183, 191 (1984) with Malley v. Briggs, 475 U.S. 335, 341 (1986) and Anderson v. Creighton, 483 U.S. 635, 641 (1987) with id. at 638.

The uncertain state of the law of qualified immunity as to whether a government official who has actual knowledge of the illegality of her conduct is immune from liability has created a conflict both between and among the federal circuit courts of appeal. See Kinports, Qualified Immunity in Section 1983 Cases: The Unanswered Questions, 23 GA. L. REV. 597, 609 n.49 (1989).

Petitioners respectfully submit that this conflict between and among the circuit courts of appeal presents an issue of public importance which should be resolved

by this Court. Petitioners also respectfully submit that this case clearly illustrates that this issue cannot be avoided by means of an attempted distinction between the government official's "subjective beliefs about the search [which] are irrelevant" and "the objective (albeit fact-specific) question whether a reasonable officer could have believed [the] warrantless search to be lawful, in light of clearly established law and the information the searching officer possessed." Anderson v. Creighton, 483 U.S. at 641 (emphasis added).

In the instant case the Sixth Circuit Court of Appeals expressly found that "the only basis for the seizure of the machines and the subsequent arrests is [Respondent] Pohlman's statements that he witnessed and

received payoffs." The Court of Appeals then reversed the District Court's grant of summary judgment to Respondent Pohlman because a reasonable jury could find that these disputed statements were intentional and knowing falsehoods. In contrast, the Court of Appeals partially affirmed the summary judgment for Respondents Massullo, Frost, Martin and Frost on the sole ground that "[t]hey were relying on the assertions of [Respondent Pohlman] that an offense had occurred."

Clearly, the Sixth Circuit's holding that Respondents Massullo, Frost, Martin and Frost were relying on the intentional falsehoods of Respondent Pohlman is a finding of fact masquerading as a rule of law. Under Rule 56 of the Federal Rules of Civil Procedure issues of credibility

and knowledge ordinarily are inappropriate for resolution on summary judgment. See, e.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

The Sixth Circuit's decision was compelled by its holding that Anderson v. Creighton, supra, precluded it from considering Respondents' subjective beliefs. This holding, however, also operated to preclude the Sixth Circuit from permitting inquiry into "the objective (albeit fact-specific) question whether a reasonable officer could have believed [the] the warrantless search to be lawful, in light of . . . the information [Respondents] possessed." Id. at 641.

In this case the information Respondents Massullo, Frost, Martin and Frost possessed was not merely the assertion of

Respondent Pohlman that he had received a payoff, but also their actual knowledge of Pohlman's lack of credibility. Thus, the issues of subjective belief and objective knowledge were indivisible: Respondents Massullo, Frost, Martin and Frost could not have reasonably believed that which they actually knew to be false.

Petitioners do not rely on a bare allegation that Respondents Massullo, Frost, Martin and Frost actually knew that Respondent Pohlman's assertions regarding a payoff were an intentional and malicious falsehood. Instead, Petitioners presented substantial objective evidence to establish this fact. Respondents' past harassment of owners and possessors of video games had caused an injunction to issue prohibiting each of the Respondents from

"seizing, impounding or confiscating" the games. Garono v. State, supra. In this case it was stipulated that these seizures served no valid law enforcement purpose. Respondent Massullo instigated Respondent Pohlman's investigation of the Stagecoach Restaurant and Lounge by making a accusation, of gambling on the premises, which he knew was false, baseless and refuted by previous investigations by his own department. At all times relevant herein it was a matter of public record that assertions by Respondent Pohlman and his associates that they received payoffs on video games were simply "incredible". State v. Skalada, supra at 1, n.1. Finally, dismissal of the gambling charges filed against Petitioners on the ground that there was no evidence to support them necessarily constituted a judicial finding that Pohlman's

testimony that he received a payoff was so incredible that no jury could believe it.

The holding of the Sixth Circuit that Petitioners are precluded by the doctrine of qualified immunity from presenting to a jury this substantial evidence that Respondents Massullo, Frost, Martin and Frost actually knew they had no probable cause to justify their search and seizure of Petitioners and their property because they knew that the assertions of Respondent Pohlman were intentional falsehoods is in direct conflict with the decisions of other circuit courts of appeal. See, e.g., Snell v. Tunnell, 920 F.2d 673 (10th Cir. 1990); Gooden v. Howard County, Md., 917 F.2d 1355 (4th Cir. 1990).

It is respectfully submitted that the conflicts between the federal circuit

courts of appeal on these important issues of public concern should be resolved by this Court.

III. LAW ENFORCEMENT OFFICERS WHO CONDUCT A WARRANTLESS SEARCH AND SEIZURE WITH NO LAWFUL AUTHORITY, UNDER NO EXIGENT CIRCUMSTANCES AND IN DIRECT VIOLATION OF AN INJUNCTION ARE ENTITLED TO NO QUALIFIED IMMUNITY IN AN ACTION BROUGHT PURSUANT TO 42 U.S.C. §1983

It is undisputed that Respondents Massullo, Frost, Martin and Frost conducted the search and seizure in this case with the knowledge that they had been absolutely enjoined from "seizing, impounding or confiscating" the very video games which they seized in their armed raid on the Stagecoach Restaurant & Lounge. Petitioners respectfully submit that, even un-

der the most restrictive test of qualified immunity, "the legal norms allegedly violated by the defendant[s] were clearly established at the time of the challenged actions." Mitchell v. Forsyth, 472 U.S. 511, 528 (1985).

In 1948 this Court explicitly held that "[t]he validity of a warrantless arrest by a state officer is governed in the first instance by state law." Johnson v. United States, 333 U.S. 10, 15 n.5 (1948). This must necessarily be true because:

> The Fourth Amendment (we begin necessarily with its words) forbids "unreasonable" searches and seizures. The word "unreasonable" implies that the propriety of a search or seizure is to be judged against a background or matrix of societal expectations and assumptions. Some reference must be made to a source outside the Fourth Amendment itself to determine, for example, whether an expectation of privacy is

> reasonable and therefore deserving of constitutional protection. Such sources include "concepts of real or personal property law [and] . . . understandings that are recognized and permitted by society."

Bissonette v. Haig, 800 F.2d 812, 814 (8th Cir. 1986)(en banc), quoting Rakas v. Illinois, 439 U.S. 128, 143-44 n.12 (1978).

Perhaps the most clearly established legal principle in American jurisprudence is the rule that an injunction must be obeyed without exception until it is vacated by an appellate court. See, e.g., Walker v. City of Birmingham, 388 U.S. 307 (1967); United States v. Shipp, 203 U.S. 563 (1906); State ex. rel. Beil v. Dota, 168 Ohio St. 315, cert. denied, 360 U.S. 912 (1958).

The refusal of the Sixth Circuit to consider the Respondents' knowing viola-

tion of an absolute injunction, issued against the Respondents to prevent precisely the violation of constitutional rights complained of, as part of the "background or matrix of societal expectations and assumptions" against which the reasonableness of a search and seizure must be judged, places its decision in irreconcilable conflict with Bissonette v. Haig, supra.

Petitioners respectfully submit that certiorari should be granted to resolve the conflict between this case and Bissonette. The relationship between state law and the underlying reasonableness of a search and seizure is worthy of this Court's consideration.

The Respondents' warrantless search and seizure of the persons and property of the Petitioners was violative of "clearly

established . . . constitutional rights of which a reasonable person would have known", Harlow v. Fitzgerald, supra at 818, for another, independent, reason.

It was clearly established law long before Respondents' warrantless armed raid on the Stagecoach Restaurant and Lounge, that, absent exigent circumstances or other lawful justification, a warrant is required before law enforcement officials may search a person or seize her property. See, e.g., Steagald v. United States, 451 U.S. 204 (1981).

In this case the Sixth Circuit held that Respondents' two hour armed seige on the Stagecoach Restaurant and Lounge could not be justified, on either statutory or constitutional grounds, as a routine administrative liquor inspection. In addi-

tion, there can be no persuasive argument that there were any exigent circumstances which would excuse Respondents' failure to secure a warrant authorizing their search and seizure of Petitioners' persons and property. More than twelve days elapsed from the conclusion of Respondent Pohlman's undercover investigation, during which he allegedly received the payoff which constituted Respondents' probable cause, and the date of the raid on the Stagecoach Restaurant and Lounge. Respondents certainly had ample opportunity to attempt to secure a warrant during this twelve day period.

This case dramatically illustrates the importance of the fourth amendment's warrant requirement as a bulwark of liberty. The obvious reason why Respondents

did not even attempt to secure a warrant in this case is because they knew that no court in Mahoning County, Ohio would issue one in light of the fact that Respondents had been enjoined absolutely from conducting such a seizure. See State v. Garono, supra.

Petitioners respectfully submit that certiorari is appropriate in this case to address the important issues presented.

IV. PEMBAUER V. CITY OF CINCINNATI, 475 U.S. 469 (1986), ESTABLISHES THAT THE UNCONSTITUTIONAL CONDUCT OF THE FINAL AND ULTIMATE POLICYMAKER ITSELF CONSTITUTES MUNICIPAL POLICY SUFFICIENT TO IMPOSE LIABILITY ON THE GOVERNMENTAL ENTITY UNDER 42 U.S.C. §1983

In this case the United States Court of Appeals for the Sixth Circuit explicit-

ly held that Petitioners had presented sufficient evidence that Respondent Massullo, Acting Chief of Police of Respondent Beaver Township, was the final policymaker of the township. The Sixth Circuit also held that a reasonable jury could find that Respondent Massullo had participated in an unreasonable search and seizure of of Petitioners in violation of the fourth amendment to the United States Constitution. Despite these findings the Sixth Circuit nevertheless affirmed the District Court's summary judgment for Respondent Beaver Township on the ground that Petitioners were required to prove that some additional "'deliberate and discernable [sic] municipal policies or customs' were the moving force behind the constitutional injury." Russo, et. al. v. Massullo, et. al., Case Nos. 90-3240 & 90-3241 (6th Cir.

1991) at 17, quoting Beddingfield v. City of Pulaski, 861 F.2d 968, 971 (6th Cir. 1988).

Petitioners respectfully submit that the Sixth Circuit simply misinterpreted Pembauer v. City of Cincinnati, 475 U.S. 469 (1986). Pembauer clearly held that the unconstitutional act of the final and ultimate policymaker itself constitutes municipal policy sufficient to impose liability on the governmental entity under 42 U.S.C. §1983:

> If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government "policy" as that term is commonly understood. More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken

> repeatedly. To deny compensation to the victim would therefore be contrary to the fundamental purpose of §1983.

Id. at 481 (footnote omitted).

CONCLUSION

For the foregoing reasons Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

Stephen W. Gard
Counsel of Record
1801 Euclid Avenue
Cleveland, Ohio 44115
(216) 687-2263

Orville E. Stifel II
1500 Leader Building
Cleveland, Ohio 44114
(216) 696-6122

Counsel for Petitioners

90-1928

Supreme Court, U.S.
FILED
JUN 13 1991
OFFICE OF THE CLERK

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

ANTOINETTE RUSSO and MILDRED MALONEY,
Petitioners,

vs.

CARL MASSULLO, BEAVER TOWNSHIP, JOHN DOE 1-7, SCOTT POHLMAN, CARL FROST, RICK MARTIN and KEN FROST,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STEPHEN W. GARD
Counsel of Record
1801 Euclid Avenue
Cleveland, Ohio 44115
(216) 687-2263

ORVILLE E. STIFEL II
1500 Leader Building
Cleveland, Ohio 44114
(216) 696-4122

Counsel for Petitioners

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NOT FOR PUBLICATION

No. 90-3240
No. 90-3241

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ANTOINETTE RUSSO (No. 90-3240)
MILDRED MALONEY (No. 90-3241)

Plaintiffs-Appellants,

v.

CARL MASSULLO, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

BEFORE: MILBURN and GUY, Circuit Judges; and BROWN, Senior Circuit Judge.

PER CURIAM: Plaintiffs-appellants Antoinette Russo and Mildred Maloney appeal from summary judgments for defendants-appellees Beaver Township, Carl Massullo (chief of the Beaver Township Police Department), Scott Pohlman (an

investigator with the Ohio Department of Liquor Control), and various members of the Beaver Township Police Department[1] in two separate actions brought under 42 U.S.C. § 1983 alleging violations of constitutional rights (along with pendent state claims) resulting from a raid by the defendants on a liquor establishment for illegal gambling activities. For the reasons that follow, we affirm in part and reverse in part.

I.

On February 16, 1990, the district court granted summary judgment against each plaintiff in favor of all defendants. Separate notices of appeal were timely filed, and the cases, having arisen out of the same incident, were consolidated for appeal.

The facts relevant to this appeal revolve around an armed raid conducted without a warrant on April 16, 1987, at the Stagecoach Restaurant & Lounge ("Stagecoach") located in Beaver Township, Ohio. At approximately 9:30 p.m. defendants Frost and Martin, police officers employed by Beaver Township, entered the premises armed with shotguns and pistols. The purpose of the raid was the "closeout" of an investigation conducted by the Ohio Department of Liquor Control ("ODLC") of gambling in the Stagecoach -- a licensed vendor of alcoholic beverages. The closeout consisted essentially of serving notices of noncompliance on the Stagecoach plus seizure of two alleged illegal gam-

[1]Defendant Pohlman was named only in his individual capacity. The township police officers and Massullo were sued in both their individual and official capacity. The township police officers and Massullo were sued in both their individual and official capacities.

bling machines ("video poker machines").

When the officers arrived at the Stagecoach, it was featuring a stage entertainer and was comparatively full of customers. According to deposition testimony of plaintiff Russo, the owner of the Stagecoach, and plaintiff Maloney, an employee who had finished her shift at 6:00 p.m. and was listening to the entertainment, officers Frost and Martin entered the premises, pointed their weapons at the persons inside, and ordered everyone inside the establishment to raise their hands over their heads. Approximately five to eight law enforcement officers followed officers Frost and Martin inside. During the first thirty minutes of the raid, a pat-down search of everyone inside the establishment was conducted, and the customers were generally allowed to leave as soon as they were searched. As the raid continued, plaintiff Russo repeatedly asked whether the officers had brought a search warrant but was told that they did not need one. Also, during this time frame, both Russo's and Maloney's purses were searched, and neither was allowed to go to the restroom without being accompanied as far as the door by a female officer. The entire incident lasted approximately two hours, and before leaving, ODLC investigators served the violation notices and seized the two alleged gambling machines.

Approximately a week after the raid, investigator Scott Pohlman filed criminal complaints against both Russo and Maloney for violations of Ohio's gambling laws. Also, the Ohio Liquor Control Commission instituted proceedings regarding Russo's continued licensure and, in an order dated

February 23, 1988, gave Russo the option of paying a forfeiture of $1400 or having her license suspended from March 22, 1988, until April 5, 1988. Both women were arrested and prosecuted, but the criminal charges were dismissed because no "testimony was offered that the machines in question were designed or adapted to generate a profit." "[P]ursuant to the acquittal rendered in Mahoning County Municipal Court," the Liquor Control Commission set aside the suspension and forfeiture and ordered the case involving Russo's license dismissed. J.A. 394.

The investigation of the Stagecoach was begun pursuant to a request by defendant Massullo to the ODLC. Part of Massullo's reason for seeking an outside investigation was an injunction issued in State v. Garono, No. __ (C.P. Mahoning County April 3, 1985), aff'd in part, Garono v. State, 37 Ohio St.3d 171, 524 N.E.2d 496 (1988), which forbade the state and Beaver Township (among others), their officers, agents, etc., from seizing machines owned by Garono Vending Co., the company that owned the machines inside the Stagecoach. Pohlman denied any knowledge of the injunction.

According to Pohlman, who conducted the investigation and led the closeout, he understood Ohio law to require more than mere possession of a poker machine by a liquor establishment in order to establish illegal conduct. Thus, Pohlman's goal in investigating was to obtain or witness a "payoff" from the establishment. Pohlman investigated and asserted that he had observed and obtained payoffs at the Stagecoach. Plaintiffs deny that the Stage-

coach made payoffs, and logs kept by Pohlman of his daily activities during the investigation fail to confirm his statements that payoffs were made.

Shortly before the raid, ODLC contacted Massullo and requested assistance. Massullo supplied armed officers without inquiring about the investigation and without instructing the officers regarding the use of firearms. According to the plaintiffs, Massullo entered the Stagecoach while his officers were present and praised them. Massullo later issued a press release publicizing the "cooperation" between his department and ODLC.

Pohlman characterized the township police department's function as providing security. Pohlman explained that he felt there was a need for additional security because he had observed fights inside the Stagecoach.

The principal issues presented in this appeal are (1) whether the district court impermissibly engaged in weighing the evidence and making credibility determinations in considering the motions for summary judgment, (2) whether qualified immunity was precluded by defendants' alleged actual knowledge of a state court injunction prohibiting seizure of the machines or actual knowledge that under Ohio law mere possession of the machines by a liquor establishment was not enough to establish their illegality, (3) whether there was a genuine issue of fact that Beaver Township had a policy or custom that was the moving force behind the alleged constitutional injuries, and (4) whether the district court should entertain the pendent claims.

II.

A.

In ruling on a motion for summary judgment, the district court must construe all the evidence and inferences to be drawn from the evidence in the light most favorable to the nonmoving party. 60 Ivy Street Corp. v. Alexander, 822 F.2d 1432, 1435 (6th Cir. 1987). Summary judgment is appropriate if there is no genuine issue as to any material fact. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Thus, summary judgment is inappropriate "[w]here the record taken as a whole could . . . lead a rational trier of fact to find for the non-moving party." Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

A section 1983 action must be based upon violation of a federal constitutional or statutory rights. Qualified immunity is available to officials performing discretionary functions unless "the contours of the right that the government official allegedly violated [were] 'sufficiently clear that a reasonable official would have understood that what he is doing violates that right.'" Poe v. Haydon, 853 F.2d 418, 425 (6th Cir. 1988) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987), cert. denied, 488 U.S. 1007 (1989). When the dispositive issue is qualified immunity, the court should deny summary judgment if there is a genuine issue of fact on which the question of immunity turns. Id. Rulings on qualified immunity and summary judgments are reviewed de novo. Eugene D. v. Karman, 889 F.2d 701, 706 (6th Cir. 1989), cert. denied, 110 S. Ct.

2631 (1990); Storer Communications, Inc. v. National Ass'n of Broadcast Employees, 854 F.2d 144, 146 (6th Cir. 1988).

B.

In granting summary judgment for the defendants, the district court held that a state statute which granted ODLC the right to conduct an administrative inspection of liquor establishments coupled with the belief that gambling violations were occurring on the premises justified the defendants' actions. The district court held that the statements of Pohlman were sufficient to establish probable cause for the seizure and arrest. The court also held that the pat-down search and the presence of armed officers was reasonable under the circumstances, but the court failed to discuss the alleged pointing of the weapons at persons inside the Stagecoach. Finally, the district court held that there was no evidence of an established custom or policy by Beaver Township upon which to base liability.

Plaintiffs challenge the district court's ruling as an improper weighing of the evidence and resolution of disputed issues of fact. Plaintiffs also point to alleged actual knowledge on the part of the defendants that their conduct was illegal and argue that liability is proper against Beaver Township given defendant Massullo's final control over day-to-day enforcement matters.

C.

Given the emphasis the parties in this case place upon what was or what was not clearly established Ohio law, we feel compelled at the outset of our discussion to point out that the proper focus in section 1983 actions is upon whether a federal constitutional or statutory right is clearly established. See Washington v. Starke, 855 F.2d 346, 348 (6th Cir. 1988). Although a state supreme court decision may clearly establish a right, Robinson v. Bibb, 840 F.2d 349, 351 (6th Cir. 1988), the right must originate in federal constitutional or statutory law. See Dunn v. Tennessee, 697 F.2d 121, 125 (6th Cir. 1982), cert. denied, 460 U.S. 1086 (1983). Thus, in this case, we are concerned with Ohio law only to the extent of its impact upon plaintiffs' federal rights. The right we first examine is plaintiffs' Fourth Amendment right to be free from an unreasonable search.

Since the liquor industry is a pervasively regulated industry, a legislative body can provide for a warrantless administrative inspection of liquor establishments. Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970). The search in this case was conducted pursuant to an Ohio statute which purports to give the ODLC authority to "[i]nspect, upon demand, the books, accounts, records, memorandums, and place of business of any [liquor establishment]." Ohio Rev. Code Ann. § 4301.10(A)(6). However, at the time of the search, it was clearly established that even where a legislative body provides for an administrative inspection of a liquor establishment without consent, but has "made no

rules governing the procedure that inspectors must follow, the Fourth Amendment and its restrictive rules apply." Colonnade Catering, 397 U.S. at 77.

Plaintiffs point out that after the raid, the statute which authorizes warrantless administrative inspections was struck down by the Supreme Court of Ohio as unconstitutional for failing to establish time, place, and scope limitations on warrantless searches. State v. VFW Post 3562, 37 Ohio St. 3d 310, 525 N.W.2d 773 (1988). Since the statute had not been struck down at the time of the raid, defendants rely on the rule that "[s]tate statutes like federal ones are entitled to [a] presumption of constitutionality until their invalidity is judicially declared." Beech v. Melancon, 465 F.2d 425, 426 (6th Cir. 1972), cert. denied, 409 U.S. 114 (1973); see also V-1 Oil Co. v. Wyoming, 902 F.2d 1482, 1489 (10th Cir.), cert. denied, 111 S. Ct. 295 (1990). Although we agree with the defendants that they had a right to conduct an administrative inspection based on the presumptive constitutionality of the statute, we do not agree that the statute was enough to clothe in qualified immunity those actions which went beyond those specifically authorized by the statute. See Colonnade Catering, 396 U.S. at 77.

Defendant Pohlman also seeks to justify the search on the basis that the draw poker machines inside the Stagecoach were "gambling devices," Ohio Rev. Code Ann. § 2915.01(F), the mere presence of which inside a liquor establishment constituted a crime. See Ohio Admin. Code § 4301:1-1-53 [hereinafter "Reg. 53"]. However, as we previously intimated, we do not question defendants' right to

enter and inspect, but we do question the scope and manner of the inspection.

D.

Turning again to plaintiffs' clearly established rights, at the time of the raid, it was clearly established that the authority to search a tavern did not give accompanying authority to search persons inside the tavern absent a reasonable belief that the particular person searched was involved in criminal activity or was dangerous.[2] Ybarra v. Illinois, 444 U.S. 85, 93-94 (1979). Also, as mentioned earlier, it was clearly established that where a legislative body provides for an administrative inspection of a liquor establishment without consent, but makes "no rules governing the procedure that inspectors must follow, the Fourth Amendment and its various restrictive rules apply." Colonnade Catering, 397 U.S. at 77. It was also clearly established at the time of the raid that reasonableness is the "ultimate standard . . . embodied in the Fourth Amendment." Hill v. McIntyre, 884 F.2d 271, 277 (6th Cir. 1989) (quoting Michigan v. Summers, 452 U.S. 692, 699-700 (1981). "[T]he test for the entry itself and all subsequent conduct is whether these are reasonable." Id. (citing Duncan v. Barnes, 592 F.2d 1336, 1338 (5th Cir. 1979). By stepping outside these bounds, a defendant sheds the cloak of qualified immunity.

With regard to qualified immunity, the

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[2]We do not intend to indicate that plaintiffs may assert the constitutional rights of others such as patrons in this action; however, we do believe that the search of patrons is relevant to the reasonableness of the scope and manner of the search and to possible injury to Russo's business.

dispositive question becomes whether a reasonable official in the defendants' position could have believed that the scope and manner of the search was reasonable. Poe, 853 F.2d at 423-24. Assuming, as we must, that the underlying factual disputes will be resolved in favor of plaintiffs, we are not convinced that the defendants could have believed that the scope and manner of the search was reasonable. Thus, we hold that summary judgment based on qualified immunity was improper regarding the scope and manner of the search.

The defendants attempt to evade liability by pointing to each other. However, their arguments are unpersuasive in light of cases holding that all members of the team are liable where there is a team effort or where the members were an integral part of an unlawful search and seizure. See Bruner v. Dunaway, 684 F.2d 422, 425-26 (6th Cir. 1982), cert. denied, 459 U.S. 1171 (1983); Simpson v. Hines, 903 F.2d 400, 403 (5th Cir. 1990); Melear v. Spears, 862 F.2d 1177, 1186 (5th Cir. 1989); Gutierrez-Rodriquez v. Cartagena, 882 F.2d 553, 561 (1st Cir. 1989). Moreover, on this record, we are not convinced that a jury could not find that Pohlman and Massullo "at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct." Birrell v. Brown, 867 F.2d 956, 959 (6th Cir. 1989).

E.

We next address plaintiffs' argument that qualified immunity is precluded by defendants' alleged actual knowledge that there was an injunction

against seizure of the machines and actual knowledge that mere possession of the machines was not enough to establish their illegality. We find this argument more relevant to the seizure of the machines and the arrest of plaintiffs than to the search issue we previously addressed. In dealing with this argument, we find it necessary to recognize a distinction between Pohlman, who instigated the seizure with statements that the Stagecoach was making payoffs, and the other defendants who apparently relied, at least indirectly, on Pohlman's statements.

At the time of the complained of acts, it was well-established that law enforcement officers may not effect an arrest or seizure by making false statements knowingly or with reckless disregard as to their truth. See Hill, 884 F.2d at 275 (citing Donta v. Hooper, 774 F.2d 716, 718 (6th Cir. 1985) (per curiam), cert denied, 483 U.S. 1019 (1987); Franks v. Delaware, 438 U.S. 154, 155-56 (1978); see also Malley v. Briggs, 475 U.S. 335 (1986). Plaintiffs' strongest arguments in regard to the illegality of their arrest and seizure of the machines is that they would not have occurred but for Pohlman's alleged false statements that payoffs were made.

We examine plaintiffs' arguments recognizing that our inquiry regarding qualified immunity is not into an officer's subjective beliefs, but center on the objective reasonableness of the officer's actions. See Anderson v. Creighton, 483 U.S. 635, 641 (1987); Ecclesiastical Order of the Ism of Am v. Chasin, 845 F.2d 113, 117 (6th Cir. 1988). However, in the context of this case, plaintiffs' argu-

ments persuade us that Pohlman could not reasonably have believed that the mere presence of the draw poker machines inside a liquor establishment was enough to justify seizure of the machines and criminal charges.

Although Reg. 53, which Pohlman relies upon to justify the arrests and seizure of the machines, was not specifically struck down until 1988 in State v. VFW Post 3562, it was strongly questioned as being overly broad by the Ohio Supreme Court's decision in Mills-Jennings of Ohio, Inc. v. Department of Liquor Control, 70 Ohio St. 95, _, 435 N.E.2d 407, 411 (1982). In fact, counsel for ODLC conceded during oral argument before the Ohio Supreme Court in Mills-Jennings that Reg. 53 should not be interpreted to go beyond the specific provisions of the criminal code. On remand, the Ohio Court of Appeals clearly held that mere possession of a draw poker machine by a liquor establishment was not enough to establish illegality. Mills-Jennings of Ohio, Inc. v. Liquor Control Comm'n, 16 Ohio App. 3d 290, _, 475 N.E.2d 1321, 1325 (1984).

Consistent with its earlier concession to the Ohio Supreme Court, at the time of the raid on the Stagecoach in 1987, the ODLC refrained from prosecution short of evidence to establish "that the intent of the device on the premises is to gamble." J.A. 393. the injunction that plaintiffs rely on in this case became the basis of a 1988 holding of the Ohio Supreme Court in Garono v. State, 37 Ohio St. 3d 171, 524 N.E. 2d 496, that mere possession of a gambling device by a liquor establishment was not enough to establish illegality. Consistent with all

these interpretations was Pohlman's own testimony that he understood the law to require more than mere presence of the machines inside a liquor establishment, i.e., a payoff. Qualified immunity is not intended to protect those who knowingly violate the law. Malley, 475 U.S. at 341; see Birrell, 867 F.2d at 958. Under these circumstances, we are convinced that Pohlman could not, and in fact did not, reasonably believe that the mere presence of the machines inside a liquor establishment was enough to establish their illegality.

Thus, the only basis for the seizure of the machines and the subsequent arrests is Pohlman's statements that he witnessed and received payoffs. If Pohlman made the statements falsely and knowingly, or with reckless disregard for their truth, then a constitutional violation is shown for which Pohlman had no immunity defense.

However, the individual members of the Beaver Township police force (including Massullo) are differently situated. They were relying on the assertions of a second law enforcement department that an offense had occurred. At the time it was not clearly established that this was not a reasonable basis for the probable cause needed for a seizure. See Donta, 774 F.2d at 721. Absent evidence that members of the township police force participated in Pohlman's alleged falsehood, the "team effort" rationale does not extend to the seizure.

In regard to the arrest, there is nothing to show that the defendant members of the Beaver Township Police Department pursued the matter beyond their participation in the search and seizure

of the machines. Plaintiffs' allegations of conspiracy are only colorable at most. Accordingly, we hold that the summary judgments in favor of members of the township police force (including Massullo) were justified insofar as seizure of the machines and the subsequent arrest of the plaintiffs. On the other hand, we hold that the summary judgments in favor of Pohlman were inappropriate.

F.

Before liability can be imposed on a governmental entity such as Beaver Township, there must be a showing that constitutional injury was inflicted "pursuant to a governmental custom or policy." Yancey v. Carroll County, 876 F.2d 1238, 1243 (6th Cir. 1989) (citing Monell v. Department of Social Servs., 436 U.S. 658, 690 (1978)). Based on Massullo's testimony that he had final control over day-to-day police matters and that he sometimes made policy without submitting his decisions to the township board of trustees, there is some evidence from which a jury could reasonably conclude that Massullo could set policy. See Johnson v. Hardin County, 908 F.2d 1280, 1286 (6th Cir. 1990). However, a plaintiff must show that "deliberate and discernable municipal policies or customs" were the moving force behind the constitutional injury. Beddingfield v. City of Pulaski, 861 F.2d 968, 971 (6th Cir. 1988). In this case plaintiffs have failed to even articulate what they perceive to be the "deliberate and discernable" policy, much less offer evidence to establish the existence of such policy. Consequently, we hold that the district court cor-

rectly granted summary judgment in favor of Beaver Township.

G.

The final issue we address concerns plaintiffs' pendent state claims. Upon granting summary judgment on the federal claims, the district court dismissed the state claims pursuant to United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966). To the extent that we have determined federal claims exist to support pendent jurisdiction, we disagree with the dismissal of the state claims.

Defendant Polhman offers an alternate ground to oust the district court of jurisdiction over the state claims. Pohlman correctly cites Haynes v. Marshall, 887 F.2d 700, 704 (6th Cir. 1989), for the proposition that Ohio state claims against state employees must be first presented to the Ohio Court of Claims. Since the district court is in a better position to determine whether or not there has been a presentation to the Ohio Court of Claims, and since the district court did not address this issue given its focus on other matters, we believe it is more appropriate to allow the district court to consider this argument on remand. See Dandridge v. Williams, 397 U.S. 471, 475 n.6 (1970).

III.

For the reasons stated, the summary judgments in favor of Beaver Township on the federal claims are AFFIRMED. the summary judgments in favor of members of the Beaver Township police force on the federal claims are AFFIRMED with

regard to the seizure of the machines and the arrest of the plaintiffs but REVERSED with regard to the alleged unreasonable search of the plaintiffs and premises. The summary judgments in favor of defendant Pohlman on the federal claims are REVERSED. The dismissal of the pendent state claims is reversed to the extent that federal claims exist to support pendent jurisdiction, and the case is REMANDED for further proceedings consistent with this opinion.

ISSUED AS MANDATE: March 27, 1991
COSTS: (Pending)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ANTOINETTE RUSSO, etc.

Plaintiff

-vs-

CARL MASSULLO
BEAVER TOWNSHIP
CARL FROST
RICK MARTIN
KEN FROST
JOHN DOE, NOS. 1-7
SCOTT POHLMAN

Defendants

JUDGE ALVIN KRENZLER

CASE NO. C88-928Y

MILDRED MALONEY

Plaintiff

-vs-

CARL MASSULLO
BEAVER TOWNSHIP
CARL FROST
RICK MARTIN
KEN FROST
JOHN DOE, NOS. 1-7
SCOTT POHLMAN

Defendants

CASE NO. C88-929Y

MEMORANDUM OF OPINION RE: GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

Plaintiff, Antoinette Russo, filed Case No. C88-928Y against the above named defendants. Plaintiff, Mildred Maloney, filed Case No. C88-929Y against the above named defendants. Because both cases arose out of the same operative facts, this Court will, for the sake of judicial economy, issue one memorandum of opinion for both cases.

The plaintiffs filed these companion complaints on April 14, 1988, alleging causes of action under 42 U.S.C. § 1983 for violations of constitutional rights protected by the fourth, fifth, ninth and fourteenth amendments to the Constitution. The complaints also alleged causes of action under the state law torts of assault, false arrest and imprisonment, malicious prosecution, intentional interference with contractual relations and intentional infliction of emotional distress. These causes of action arose from the same set of events, which occurred on April 16, 1987. Each plaintiff filed amended complaints on October 17, 1988, to correct the designations of several defendants.

The defendants filed motions for summary judgment in both cases in November of 1988. Although defendant Scott Pohlman filed his motion separately from those of the other defendants, Carl Massullo, Beaver Township, Carl Frost, Rick Martin, Ken Frost, and John Does 1-7, the issues raised by both sets of motions are substantially the same. Therefore, the Court will Address the motions for summary judgment filed by all defendants in both of these companion cases simultaneously. For the

reasons described later in this memorandum, the Court is granting defendants' motions for summary judgment.

FACTS

The operative facts of this case are as follows: On February 2, 1987, Beaver Township Police Chief Carl Massullo, having received anonymous tips that gambling activity was occurring on the premises of several licensed liquor establishments in the vicinity of Beaver Township, wrote a letter to Michael Dodd of the Ohio Department of Liquor Control ("DLC") in Akron. In this letter, defendant Massullo ("Massullo") requested the assistance of the DLC in investigating certain illegal gambling activities at these locations in Mahoning County, the county in which Beaver Township is situated.

Pursuant to this letter, the DLC began an undercover investigation of these locations, one of which was the Stagecoach Restaurant & Lounge ("Stagecoach"), which was owned and operated by plaintiff, Antoinette Russo ("Russo"). The DLC employee primarily conducting the investigation was defendant, Scott Pohlman ("Pohlman"). During his investigation of the Stagecoach in the month of March 1987, Pohlman observed the presence there of two video "draw poker" machines. These machines are video games which simulate the game of poker. They allow a player to vary the amount of risk by placing different amounts of money into the machine, and if a player receives enough points to enable him to win free games, such machines allow him to trade in these extra points for cash. This practice is known as giving or receiving a "payoff."

Pohlman testified in his deposition that while he was undercover at the Stagecoach, he observed such payoffs to customers, and in fact received a payoff from plaintiff Mildred Maloney ("Maloney"), who was then the cook at the Stagecoach. Pohlman informed his superior that these activities were occurring, and a meeting was scheduled to coordinate enforcement efforts. DLC investigators, including Pohlman, and members of Beaver Township Police, including defendants, Massullo, Frost and Martin, were present at this meeting. The evening of April 16, 1987, was chosen as the date on which the Stagecoach would be entered, its owner cited for gambling violations, and the video draw poker machines seized and confiscated. DLC requested that, for the purpose of protecting its agents, several armed, uniformed officers of the Beaver Township police be present at this raid.

On the evening of April 16, 1987, at approximately 9:30 p.m., two agents from the DLC, followed by two officers of the Beaver Township Police Department and two plainclothes agents from the Internal Revenue Service, entered the Stagecoach and proceeded to issue citations to its owner. For their own protection, one or more of the agents initially performed patdown searches of some customers and inspected the premises to determine if any concealed weapons were present. During the course of the evening, plaintiffs were questioned about the ownership of the poker machines, which were later learned to be leased by Russo from Garono Vending Company. Russo, in her deposition, testified that she answered no questions until

her attorney was present, and also that her purse was searched by one of the agents. At different points during the raid, Massullo and Pohlman each stopped in at the Stagecoach to check on the progress, but remained there only for a brief time. At approximately 11:20 p.m., the agents and officers left the Stagecoach, the DLC agents having confiscated the poker machines. One week later, on April 22, 1987, plaintiffs were charged with gambling and operation of a gambling house.

LAW

The complaints in these cases allege generally that the defendants' search, seizure, detention and arrest of the plaintiffs under color of Ohio law violated the plaintiffs' rights under the fourth, fifth, ninth and fourteenth amendments to the Constitution. The complaints also allege that defendant Beaver Township, pursuant to an established custom or policy of permitting constitutional violations, allowed these acts to occur. According to the plaintiffs, this conduct, in addition to giving rise to various state common law torts, places the defendants within the bounds of 42 U.S.C. § 1983, which provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

> Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

Although no affirmative defenses are explicitly provided for by this section, it is well established that two types of immunity may be asserted by defendants as affirmative defenses.

Absolute immunity is an affirmative defense commonly asserted by judges and prosecutors who are defendants in § 1983 actions. It may be granted by the court if the defendant's acts were committed within the scope of his official duties. When it is granted, it shields the defendant from liability.

Qualified immunity is another affirmative defense, commonly asserted by law enforcement officers. Indeed, qualified innunity is asserted by all the defendants in this case. Qualified immunity serves an important purpose--it "accommodates two important competing interests. On the one hand, an action for damages may be the only realistic avenue for vindication of constitutional guarantees' where officials violate the public trust." Poe v. Haydon, 853 F.2d 418, 424 (6th Cir. 1988) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 814, 102 S. Ct. 2727, 2736 (1982). On the other hand, "government officials must be given some assurance that they can perform their duties without fear of monetary liability or the diversions inherent in litigation. The doctrine of qualified immunity seeks to achieve this salutary goal." Poe, 853 F.2d at 424.

Qualified immunity will be granted to a defen-

dant if his "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. at 818. This objective standard, established by the Supreme Court in the Harlow case in 1982, was a substantial departure from the previous standard for qualified immunity, which had both objective and subjective elements. The purpose of eliminating the subjective element was to "avoid excessive disruption of government and [to] permit the resolution of many insubstantial claims on summary judgment." Id.

This objective standard was recently clarified by the Supreme Court in Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034 (1987). The Court in Creighton explained that "[t]he operation of this standard, however, depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified. . . . It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Creighton, 483 U.S. 635, 639-40, 107 S. Ct. 3034, __.

An important element of the standard is that of "clearly established" law. To determine whether law is clearly established, one must look first at the decisions of the Supreme Court and the courts of the circuit in which the case is tried. Poe, 853 F.2d at 424; Garvie v. Jackson, 845 F.2d 647, 649 (6th Cir.

1988). One may also look to the decisions of the highest state court in the state where the case arose. Robinson v. Bibb, 840 F.2d 349, 352 (6th Cir. 1988).

It is also settled that the "[r]esolution of that issue [of clearly established law] is purely a matter of law for the trial judge to determine." Dominque v. Telb, 831 F.2d 673, 377 (6th Cir. 1987). The Sixth Circuit added in Dominque that "[t]he source for that determination is, of course, in federal constitutional, statutory or case law existing at the time." Id.

In order for the plaintiffs to establish a violation of constitutional rights which would allow them redress under 1983, the plaintiffs must show that the official conduct of the defendant officers and agents rose above mere negligence. Yancey v. Carroll Cy., Ky., 876 F.2d 1238, 1242 (6th Cir. 1988) (citing Nishayama v. Dickson Cy., Tn., 814 F.3d 277, 281 (6th Cir. 1987) (en banc)). As the Sixth Circuit stated in Yancey, "[i]nvestigation, without more, simply does not rise to the level of a constitutional violation cognizable under 42 U.S.C. § 1983." Yancey, 876 F.2d at 1245.

Similarly, "[w]ith reference to a governmental entity, the [plaintiff] can show a violation or §1983 only if the entity's supervisory personnel cause constitutional deprivations pursuant to a governmental custom or policy. Id. at 1243 (citing Monell v. Dept. of Social Services of New York, 436 U.S. 658, 690, 98 S.Ct. 2018, 2035 (1978)).

At the time the facts of this case arose, April 1987, the body of law regarding searches and seizures appeared as follows: The fourth

amendment's prohibition against unreasonable searches and seizures was extended to the area of administrative inspections of commercial property. Marshall v. Barlow's Inc., 436 U.S. 307, 56 L. Ed.2d 305, 98 S. Ct. 1816 (1978). This is only proper, since the "basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." Camara v. Municipal Court, 387 U.S. 523, 528, 87 S. Ct. 1727, __, 18 L. Ed.2d 930, (1967). The mechanism by which the fourth amendment fulfills this purpose is the requirement of a warrant based on probable cause.

However, there are several recognized exceptions to the warrant requirement. One of these deals with "closely regulated industries." As the Court explained in Marshall v. Barlow's, Inc., "[t]he element that distinguishes these enterprises from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware." Marshall, 436 U.S. at 313, 98 S. Ct. 1816, , 56 L. Ed.2d 305, 312.

> In these closely regulated industries, a warrant may not be constitutionally required when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.

Donovan v. Dewey, 452 U.S. 594, 600, 101 S. Ct. 2534, __, 69 L. Ed.2d 262, 270 (1981). The liquor industry is recognized as such an industry. Colonnade Catering Corp. v. United States, 397 U.S. 72, 90 S. Ct. 774, 25 L. Ed.2d 60 (1970). Thus, it is clear that warrantless searches of licensed liquor premises were constitutionally valid in 1987.

In the state of Ohio, the liquor industry is regulated by the Department of Liquor Control, which issues permits to engage in the sale of alcohol. As the Supreme Court of Ohio stated in Solomon v. Liquor Control Commission, 4 Ohio St.2d 31, 33 Ohio Op.2d 339 (1965), "[o]ne who applies for and is issued a permit to sell alcoholic beverages thereby assents to the reasonable and lawful conditions imposed by statute and rule." Id. at 33, 33 Ohio Op.2d at 341.

The Department of Liquor Control is authorized under Ohio Rev. Code Ann. § 4301.10 to "[e]nforce Chapters 4301 and 4303 of the Revised Code, and the rules and orders of the liquor control commission and director." Ohio Rev. Code Ann. § 4301.10(A)(4). The rules of the liquor control commission are found in the Ohio Administrative Code. Former Ohio Admin. Code 4301:1-1-53, dealing with gambling and gambling devices, stated as follows:

> (B) No person authorized to sell alcoholic beverages shall have, harbor, keep, exhibit, possess or employ or allow to be kept, exhibited or used in, upon or about the premises of the permit holder of any gambling device as defined in

> division (F) of section 2915.01 of the Revised Code which may or can be used for gambling offenses as defined in division (G) of section 2915.01 of the Revised Code.

Ohio Admin. Code 4301:1-1-53(B). The Department of Liquor Control was also entitled to "inspect, upon demand, the books, accounts, records, memorandums, and place of business of any person subject to Chapters 4301 and 4303 of the Revised Code or the laws relating to the manufacture, importation, transportation, distribution, and sale of beer and intoxicating liquor, and the sale of alcohol." Ohio Rev. Code Ann. § 4301.10(A)(6). The combination of these statutes and regulations authorized the Department of Liquor Control to inspect licensed liquor premises for illegal gambling activities and devices during the time period in question.

In 1987, the state of the law regarding gambling devices in Ohio was as follows: In 1982, the Supreme Court of Ohio, in Mills-Jennings of Ohio, Inc. v. Department of Liquor Control, 70 Ohio St.2d 95, 24 Ohio Op.3d 181, 435 N.E.2d 407 (1982), determined that the video poker machines involved in that case were used to play the game of poker, which is a game of chance under Ohio Rev. Code Ann. § 2915.01(D). Id. at 97, 24 Ohio Op. at 182, 435 N.E.2d at 408. The court also held that these poker machines were per se gambling devices under Ohio Rev. Code Ann. §2915.01(F). Id. These conclusions were supported by this court's opinion in United States v. One Hundred Thirty-Seven Draw Poker-Tyoe Machines and Six Slot Machines, 606 F.

Supp. 747 (D.C, N.D. Ohio 1984). As Judge Manos stated in that opinion, "there can be no doubt that the defendant draw poker machines are designed and manufactured primarily for use in connection with gambling and by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, money or property." Id. at 754.

The plaintiffs have cited several Ohio cases which are contrary to those discussed above and which cast some doubt upon the state of the law in this area in 1987. The plaintiffs are relying primarily on State v. Gavlek, No. 83 C.A. 25 (Mahoning App., Dec. 27, 1983), which held that poker was not a game of chance and that the poker machines were not illegal gambling devices; and Garono v. State, No. 85 C.A. 44 (Mahoning App., Mar. 27, 1987), which upheld an injunction against the seizure of poker machines owned by Garono Vending Company. The plaintiffs also cite State v. V.F.W. Post 3562, 37 Ohio St.3d 310, 525 N.E.2d 773 (1988), in which the Supreme Court of Ohio held that Ohio Rev. Code Ann. §§ 4301.10(A)(4), (6), and (7) and Ohio Admin. Code 4301:1-1-53 are unconstitutional because they fail to set reasonable time, place and scope limitations on warrantless administrative searches; and Garono v. State, 37 Ohio St.3d 171, 524 N.E.2d 496 (1988), in which the same court held that poker machines could not be seized without evidence of their use for profit.

As to the first two cases, although they were decided by the court of appeals in the same county in which the case at bar arose, they are contrary to

the law adopted by the Supreme Court of Ohio in Mills-Jennings. As discussed previously, the term "clearly established law" means the decisions of the United States Supreme Court, the federal courts of the appropriate circuit, or the highest court of the state in which the controversy arose. Pursuant to this standard, the law adopted by Mills-Jennings was the clearly established law of Ohio until 1988, when the latter two cases were decided. For this reason, the latter two cases are irrelevant in determining what the state of the law was in 1987.

The motions before this Court are the defendants' motions for summary judgment, in which the defendants claim they are entitled to qualified immunity from liability under § 1983.

The granting of summary judgment is authorized by Rule 56(C) of the Federal Rules of Civil Procedure when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(C).

The purpose of motions for summary judgment is to isolate factually insufficient claims and defenses and prevent them from going to trial. Celotex v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed.2d 265 (1986). As the Court in Celotex stated: "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action.'" Id. at _,

106 S. Ct. at __, 91 L. Ed.2d at 276 (quoting Fed. R. Civ. P. 1).

The standard for granting motions for summary judgment has been characterized as essentially a mirror image of that for a directed verdict: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby 477 U.S. 242, 106 S. Ct. 2505, __, 91 L. Ed.2d 202, 214 (1986).

The trial judge cannot find that a genuine triable issue exists "unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. . . . If the evidence is merely colorable . . . or is not significantly probative, summary judgment may be granted." Id. at __, 106 S. Ct. at __, 91 L. Ed.2d at 212 (citations omitted).

APPLICATION

The Court will now evaluate the facts of this case with respect to the defendants' rights to qualified immunity, in light of the standards for (1) determining entitlement to qualified immunity which were discussed in the sections above; and (2) granting a motion for summary judgment.

The standard for qualified immunity is whether the officer acted reasonably in light of clearly established law at the time. Here the defendants were conducting a search and seizure pursuant to a state statute which was presumed valid at the time. Their reason for conducting the search and seizure was their reasonable belief that gambling violations were occurring on the premises.

This belief was based on the testimony of defendant Pohlman, who witnessed the presence of poker machines and payoffs to players of these machines, and on the statement of the Supreme Court of Ohio that such machines were illegal gambling devices. Further, while the defendants should not be commended for ignoring an injunction against them, the injunction was contrary to the clearly established law of Ohio at the time these events occurred.

Plaintiffs' complaints suggested that the scope of the defendants' search and the degree of force used were unreasonable. However, law enforcement officers are often placed in situations where they must make split-second decisions affecting their safety, the safety of others, and the preservation of evidence. In this context, the patdown searches of people in a bar where illegal gambling activity is believed to be occurring in order to protect the officers from any concealed weapons is not unreasonable. The presence of armed police officers to maintain order during the search is also not unreasonable. The search of the bar owner's purse for evidence of illegal gambling was not necessarily unreasonable, in light of the authorization of the Department of Liquor Control by Ohio Rev. Code Ann. § 4301.10 to inspect the papers of the licensee upon demand.

Finally, the arrest of plaintiffs was not unreasonable, since it was based on the presence of the poker machines in plaintiff Russo's premises, and on the statements of Pohlman that he witnessed the making of payoffs and on one occasion received one

from plaintiff Maloney. These facts gave rise to probable cause that a crime had been committed by the plaintiffs, thus their arrest was not unreasonable.

The plaintiffs' complaints also allege that the defendant, Beaver Township, permitted such conduct pursuant to an established custom or policy of allowing constitutional violations. However, the plaintiffs fail to supply any evidence of this other than Chief Masullo's participation in the planning of the raid. Since it has already been determined that defendants' conduct in planning and conducting the raid was not unreasonable, this claim must fail.

Therefore, because the defendants acted reasonably in light of the clearly established law in place at the time, they are entitled to qualified immunity. Because the plaintiffs, in opposing defendants' motions for summary judgment, have failed to bring forth sufficient evidence that would allow a jury to bring a verdict in their favor, there is no genuine issue of material fact to be tried. Thus, defendants are entitled to summary judgment on the § 1983 claim.

There are still several state causes of action remaining. The ability of this court to try these state claims was initially due to the doctrine of pendent jurisdiction.

This type of jurisdiction arises when a federal claim, arising under the Constitution, laws or treaties of the United States, is so closely related to a state claim that a plaintiff "would ordinarily be expected to try them all in one judicial proceeding." United Mine Workers v. Gibbs, 383 U.S. 715, 725,

86 S. Ct. 1130, ___, 16 L. Ed.2d 218, 228 (1966). However, "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." Id. at 726, 16 L. Ed.2d at 228.

Because the plaintiffs' federal claims under 42 U.S.C.§ 1983 have been eliminated before trial by summary judgment, the state claims against the defendants shall also be dismissed.

UNITED STATES DISTRICT JUDGE

Stephen Gard
Orville Stifel
Todd Raskin
Rita Eppler
Jeffrey Duber
Susan Muskovitz

(3)

Supreme Court, U.S.
FILED
JUL 18 1991
OFFICE OF THE CLERK

CASE NO. 90-1928

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

ANTOINETTE RUSSO and MILDRED MALONEY,
Petitioners,

vs.

CARL MASSULLO, BEAVER TOWNSHIP, JOHN DOE 1-7, SCOTT POHLMAN, CARL FROST, RICH MARTIN and KEN FROST,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LEE FISHER
Attorney General of Ohio

RITA S. EPPLER
Chief, Federal Litigation Section
Counsel of Record

NANCY J. MILLER
Deputy Chief Counsel

NANCY JOHNSTON
JACK W. DECKER
JERRY K. KASAI
Assistant Attorneys General
30 East Broad Street, 17th Floor
Columbus, Ohio 43266-0410
(614) 644-5003
Counsel for Respondent Pohlman

QUESTIONS PRESENTED FOR REVIEW

1. Does an injunction issued by an intermediary state court create a ministerial duty sufficient to deprive law enforcement officials of their qualified immunity to a 42 U.S.C. §1983 action if the injunction does not form the basis for the federal cause of action?

2. Is the reasonableness of a search and seizure a relevant inquiry in determining whether a law enforcement official is entitled to qualified immunity in a 42 U.S.C. §1983 action?

PARTIES TO THE PROCEEDING

Petitioners

1. Antoinette Russo, the owner of the Stagecoach Restaurant and Lounge located in Beaver Township, Ohio.

2. Mildred Maloney, a former employee at the Stagecoach Restaurant and Lounge.

Respondents

1. Scott Pohlman, in his individual capacity as a state liquor control agent.

2. Carl Massullo, individually and in his official capacity as acting chief of the Beaver Township police department.

3. Carl Frost, individually and in his official capacity as a police officer with the Beaver Township police department.

4. Rick Martin, individually and in his official capacity as a police officer with the Beaver Township police department.

5. Ken Frost, individually and in his official capacity as a police officer with the Beaver Township police department.

6. John Does 1-7, individually and in their official capacity.

7. Beaver Tonwhip, a political subdivision in Mahoning County, Ohio.

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RULES

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STATEMENT OF THE CASE

On April 16, 1987, Petitioners Antoinette Russo ("Russo") and Mildred Maloney ("Maloney") filed companion complaints pursuant to 42 U.S.C. §1983 against Respondents Beaver Township, various members of the Beaver Township police force and Scott Pohlman ("Pohlman"), an investigator for the Ohio Department of Liquor Control ("ODLC"). The complaints alleged violations of Petitioners' rights under the fourth, fifth, ninth and fourteenth amendments to the United States Constitution. Petitioners' complaints revolve around an inspection of the Stagecoach Restaurant and Lounge ("Stagecoach") conducted pursuant ot Ohio Rev. Code Ann. 4301.10(A)(6). This inspection was conducted at the culmination of an investigation by the ODLC which has authority to enforce the liquor laws of the State of Ohio. Ohio Rev. Code Ann. 4301.10(A)(4).

Respondent Pohlman's involvement in the investigation was a result of a request to ODLC by Respondent Massullo, Chief of the Beaver Township police force, for assistance in investigating illegal gambling activity at the Stagecoach. During Pohlman's investigation, which spanned the month of March 1987, he observed two video draw poker machines in operation at the Stagecoach.

Video draw poker machines are video games that simulate the game of poker. When a player receives a winning hand, the machine credits the player with points. If the player reaches a certain number of points or accumulates a certain number of credits, the player receives cash or some other reward from the liquor establishment. This is known as giving or receiving a "pay-off". Pohlman observed Petitioner Maloney, then employed as a cook for the Stagecoach, making payoffs and he received such a payoff himself.

Pohlman reported his findings regarding the Stagecoach to his superior and a meeting took place to coordinate enforcement efforts of the ODLC with the Beaver Township police force. It was determined that ODLC investigators would close the investigation by conducting a raid of the subject liquor establishments. The raid consisted of entering a series of establishments, including the Stagecoach, inspecting the premises, issuing violation notices to the permit holder, seizing evidence of gambling violations and confiscating the video drawpoker machines. The Beaver Township police force agreed to participate in the raid, providing armed officers to protect the ODLC investigators when they entered the Stagecoach.

On April 16, 1987, at 9:30 p.m., two agents of ODLC named Steven Hasseman and Curtis Hundley, accompanied by armed Beaver Township police officers and plain clothes

United States Internal Revenue agents, entered the Stagecoach. Initially, to insure their own safety, one or more of the agents inspected the premises for concealed weapons and conducted pat down searches of some customers. Respondent Pohlman arrived at the Stagecoach at approximately 10:30 p.m. to check on the progress of Hasseman and Hundley. He stayed approximately fifteen to thirty minutes. During this time Pohlman did not pat down, search or point a gun at the Petitioners. By 11:20, the investigation was complete and the agents and officers left the Stagecoach.

During the course of the evening, Petitioners were questioned about the ownership of the draw poker machines. Petitioner Russo refused to answer any questions until her attorney was present. It was later learned that Russo leased the machines from Garono Vending Company ("Garono") and that Garono, in a separate

case, had obtained an injunction from the Mahoning County Court of Common Pleas enjoining seizure of poker machines owned, leased or operated by Garono.

On April 22, 1987, Pohlman presented his facts to the prosecutor's office and signed as complaining witness against Petitioners. Petitioners were charged with gambling and operation of a gambling house. These cases were subsequently dismissed by the Canfield, Ohio, Municipal Court.

Petitioners filed complaints in the United States District Court for the Northern District of Ohio, Eastern Division on April 14, 1988. On October 17, 1988, Petitioners filed amended complaints asserting their cause of action under 42 U.S.C. §1983. All Defendants moved for summary judgment. The District Court for the Northern District of Ohio granted these motions on the basis that the Defendants were entitled to qualified immunity on the

§1983 claims because they acted reasonably in light of the clearly established law at the time of the incident. (App. p. B-14-16). The pendent State claims were also dismissed. (App. p. B-16-17).

Petitioners appealed to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit in an unpublished per curiam opinion affirmed summary judgment as to all federal claims against Beaver Township as well as the federal claims against the members of the Beaver Township police force regarding seizure and arrest. (App. p. A-15-16). Summary judgment was reversed with regard to the claims against the Beaver Township police force for unreasonable search of the Petitioners and the premises. (App. p. A-16-17). In addition, summary judgment granting qualified immunity for Respondent Pohlman was reversed on the grounds that there existed a question of fact as to whether Pohlman's statements that

he witnessed and received payoffs were made falsely or with reckless disregard for their truth. (App. p. A-14). Finally, the Lower Court reversed dismissal of the pendent claims to the extent that federal claims existed to support pendent jurisdiction. (App. p. A-16). The case was remanded for further proceedings.

Petitioners' petition for writ of certiorari was docketed with this Court on June 13, 1991.

REASONS FOR DENYING THE WRIT

Rule 10 of the Rules of the Supreme Court of the United States provides the basic criteria for determining whether a case warrants the issuance of a writ of certiorari:

* * *

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

This case does not satisfy any of these criteria.

Respondent does not believe that Petitioners have raised an issue warranting the Court's plenary review. Nevertheless, a conditional cross-appeal has been filed to permit Respondent to present to the Court, if certiorari is granted, those portions of the Sixth Circuit's opinion reversing the District Court on the issue of Respondent Pohlman's qualified immunity.

I. THIS CASE DOES NOT WARRANT EXERICSE OF THIS COURT'S JURISDICTION SINCE THE DUTY AT ISSUE IS DISCRETIONARY AND THIS CASE DOES NOT CONFLICT WITH PRECEDENT REGARDING THE NARROW MINISTERIAL EXCEPTION TO QUALIFIED IMMUNITY

Petitioners maintain that a significant conflict has developed between the United States courts of appeals on the issue of whether a government official acting in violation of a ministerial duty is entitled to qualified immunity as a defense to a 42 U.S.C. §1983 action. It is Petitioners' contention that the instant case aligns the Sixth Circuit with the Fourth, Seventh and

Eighth Circuits in granting qualified immunity in a §1983 action to a government official who violates a clear ministerial duty. Petitioners' contention is incorrect not only because Respondents' actions were discretionary but also because the circuits have been consistent in analyzing the criteria for qualified immunity.

A. The Duty At Issue In This Case Is Discretionary.

The challenged activity at issue in the case at bar involved a decision to conduct a warrantless administrative search of a liquor establishment and to seize illegal draw poker machines found therein. While neither of the courts below addressed the issue of the nature of this function, the raid was clearly not conducted pursuant to any law of sufficient specificity to create a ministerial duty. See Davis v. Scherer, 468 U.S. 183 (1984).

In Davis, this Court ruled that an official sued for a constitional violation does not lose qualified immunity merely because his conduct violates a state regulation. 468 U.S. at 193. The Court reasoned that to hold otherwise would require officials to assess whether the intent of a particular regulation or statute was to protect a constitional right. Id. This intent inquiry would return the qualified immunity analysis to pre-Harlow v. Fitzgerald, 457 U.S. 800 (1982), subjective inquiries, thus preventing resolution on summary judgment, a result that the Court concluded would "disrupt the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties." 468 U.S. at 195.

It was argued in Davis that the regulation created a ministerial duty and

the official should therefore be denied qualified immunity since Harlow provides immunity for the exercise of discretionary functions. The Court delineated the scope of its "ministerial duty" exception to qualified immunity as being limited to circumstances where the law or regulation specified the "precise action that the official must take in each instance" and the breach thereof gave rise to the cause of action for damages. 468 U.S. at 196 n.14.

Respondents' challenged actions were taken pursuant to Ohio Rev. Code Ann. §4301.10 which provides, in pertinent part:

> (A) The department of liquor control shall:
>
> * * *
>
> (4) Enforce Chapters 4301. and 4303. of the Revised Code, and the rules and orders of the board, the director, and the penal laws relating to the manufacture, importation, transportation, distribution, and sale of beer and intoxicating liquors; ...
>
> * * *

> (6) Inspect, upon demand, the books, accounts, records, memeorandums, and place of business of any person subject to Chapters 4301. and 4303. of the Revised Code...
>
> (7) Delegate to any of its agents or employees any power of investigation which the department possesses and the powers of police officers with respect to the enforcement of any of the penal laws relating to beer and to intoxicating liquor, ...

The duties imposed by this statute can only be deemed discretionary.

Since no court has suggested that the duty at issue in the instant case is ministerial, Petitioners' contention that the officers were accorded qualified immunity for actions taken in violation of a ministerial duty is in error. Furthermore, since the duty at issue is so clearly discretionary, granting Respondents qualified immunity is consistent with established qualified immunity precedent of the United States courts of appeals.

B. This Case Presents No Conflict In The Circuit Courts Of Appeals

Petitioners contend that Withers v. Levine, 615 F. 2d 158 (4th Cir.), cert. denied, 449 U.S. 849 (1980); Coleman v. Frantz, 754 F. 2d 719 (7th Cir. 1985); McIntosh v. Weinberger, 810 F. 2d 1411 (8th Cir. 1987), vacated, sub nom. Turner v. McIntosh, 487 U.S. 1212 (1988), cert. denied, sub nom. McIntosh v. Carlucci, 487 U.S. 1217 (1988); and the instant case inappropriately grant qualified immunity to an official acting in violation of a ministerial duty. Petitioners' Brief at 19. Petitioners maintain that these cases conflict with decisions in the First, Third, Fifth, Ninth and Eleventh Circuits which recognize a distinction between discretionary and ministerial functions, finding that a governmental official is entitled to qualified immunity only if engaged in a discretionary function rather

than a ministerial duty when the alleged violation of a federal right occurs. Id. Petitioners cite in support of this proposition, Fonte v. Collins, 898 F. 2d 284 (1st Cir. 1990); People of Three Mile Island v. Nuclear Regulatory Commissioners, 747 F. 2d 139 (3d Cir. 1984); Gagne v. City of Galveston, 805 F. 2d 558 (5th Cir. 1986), cert. denied, Gagne v. Putnal, 483 U.S. 1021 (1987); Trotter, Inc. v. Watkins, 869 F. 2d 1312 (9th Cir. 1989); Harrel v. United States, 875 F. 2d 828 (11th Cir. 1989). Id. at 19-20.

Petitioners argue that public policy demands that the "conflict" be resolved by an explicit holding that a governmental official who violates a clear ministerial duty forfeits any claim to qualified immunity. However, this Court already directly addressed this issue in Davis v. Scherer, wherein it was specifically recognized that a narrow ministerial duty

exception to qualified immunity exists. 468 U.S. at 196 n. 14.

Davis made clear that the standard announced by the Court in Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), which provides that "government officials performing discretionary functions generally are shielded from liability for civil damages in so far as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known", contemplated a narrow ministerial duty exception to official qualified immunity. Any ambiguity about the existence of this exception that may have existed after Harlow was removed by this Court's statement in Davis that, "this Court's doctrine grants qualified immunity to officials in the performance of discretionary, but not ministerial, functions." Davis, 468 U.S. at 196 n. 14.

Davis made clear two important

limitations on the circumstances under which violation of a ministerial duty will deprive an official of qualified immunity. First, an official who violates a ministerial duty and who at the same time violates an individuals constitutional or statutory rights will be deprived of the qualified immunity defense only if the ministerial duty breach actually gives rise to the cause of action. Id. Petitioners mistakenly label an intermediary state court injunction, as a source of law creating a ministerial duty. Violation of the injunction against seizing Garono-owned machines does not give rise to a §1983 claim. The remedy for breach of this state court injunction is contempt, not an action under 42 U.S.C. §1983. In addition under Harlow, it is "clearly established statutory or constitutional rights" that an official must not violate to still enjoy qualified immunity. The Sixth Circuit looks to

decisions of this Court, the Sixth Circuit or the state's highest court to determine clearly established law. See Ohio Civil Service Employees Ass'n v. Seiter, 858 F.2d 1171, 1177 ("to find clearly established constitutional right, a district court must find binding precedent by the Supreme Court, its court of appeals or itself... a mere handful of decisions of other circuit and district courts, which are admittedly novel, cannot form the basis for a clearly established constitutional right in this circuit"). See also Poe v. Haydon, 853 F.2d 418, 424 (6th Cir. 1988), cert. denied, 488 U.S. 1007 (1989); Robinson v. Bibb; 840 F.2d 349, 351 (6th Cir. 1988); Garvie v. Jackson, 845 F.2d 647, 649 (6th Cir. 1988); Davis v. Holly, 835 F.2d 1175, 1180 (6th Cir. 1987).

The earliest case Petitioners cite as according qualified immunity to an official in the exercise of a ministerial function is Withers v. Levine, 615 F.d 158 (4th Cir.

1980). Just as in the case at bar, in Withers the court made no determination that the duty at issue was a ministerial function. Moreover, Withers predated Harlow. It was decided under the former two-prong test for qualified immunity set forth in Procunier v. Navarette, 434 U.S. 555 (1978) and Wood v. Strickland, 420 U.S. 308 (1975) which encompassed a subjective as well as an objective component. Withers, 615 F. 2d at 162-63. This Court has since rejected the subjective prong of the qualified immunity test, focusing instead on the objective reasonableness of the challenged action. Anderson v. Creighton, 483 U.S. 635, 639-40 (1987); Davis v. Scherer, 468 U.S. 183, 193-95 (1984); Mitchell v. Forsyth 472 U.S. 511, 530 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 815-19 (1982).

The Fourth Circuit's only mention of a ministerial duty in Withers is in the

context of pointing out that the focus of the good faith qualified immunity inquiry was on whether the official had reason to believe he was violating a constitutional right, not on a distinction between ministerial and discretionary actions. 615 F.2d at 163. It is clear from the facts of Withers that if decided today under the contours of this Court's decision in Davis which classifies as discretionary all laws except those that "specify the precise action that the official must take in each instance", the official duty at issue would be determined discretionary. 468 U.S. at 196 n. 14. Withers involved an action for damages based on the sexual assault of a prisoner. Plaintiff maintained that his constitutional right to be free from cruel and unusual punishment was violated by the prison official who assigned him to a cell with a known violent sex offender. The prison had no effective procedure for

assigning prisoners to cells. The function was completely discretionary. Withers therefore is not a case where an official was extended qualified immunity while engaged in a ministerial function as Petitioners maintain and presents no conflict with Davis or the instant case.

Coleman v. Frantz, 754 F. 2d 719 (7th Cir. 1985), decided under the Harlow standard of qualified immunity, is also cited by Petitioners as according qualified immunity to an official acting in violation of a ministerial duty. Petitioners' Brief at 19. Coleman involved a suit for damages against a county sheriff for failure to promptly bring the plaintiff before a magistrate. In essence, the Seventh Circuit Court of Appeals determined that the duty was not ministerial stating, "it cannot be said that there was an adequately defined duty upon him to undertake formally the futile act of attempting to bring Coleman to

the Wells Circuit Court." 754 F.2d at 728 (citation omitted). This analysis comports with the Davis classification of discretionary acts as all but those laws which "specify the precise action that the official must take in each instance..." 468 U.S. at 196 n. 14.

Petitioners' final citation which purportedly evidences an inconsistency among the circuits is McIntosh v. Weinberg, 810 F.2d 1411 (8th Cir. 1987), vacated, sub nom. Turner v. McIntosh, 487 U.S. 1212 (1988), cert. denied, sub nom. McIntosh v. Carlucci, 487 U.S. 1217 (1988). Petitioners' brief does not reflect that McIntosh was vacated by this Court. Therefore Petitioners' reliance on McIntosh v. Weinberger, 810 F.2d 1411 (8th Cir. 1987), is misplaced.

In the instant case Petitioners mistake the scope of the ministerial exception, as did the appellee's in Davis.

> Appellee's contention mistakes the scope of the "ministerial duty" exception to qualified immunity in two respects. First, as we have discussed, breach of a legal duty created by the personnel regulation would forfeit official immunity only if that breach itself gave rise to the appellee's cause of action for damages. This principle equally applies whether the regulation created discretionary or ministerial duties. Even if the personnel regulation did create a ministerial duty, appellee makes no claim that he is entitled to damages simply because the regulation was violated.

468 U.S. at 196 n. 14. Petitioners herein claim that an intermediary state court injunction, in an unrelated case, enjoining seizure of Garono-owned video machines, created a ministerial duty. The injunction, however, can not be said to give rise to a cause of action for violation of federal constitutional or statutory rights. Therefore it is irrelevant whether the injunction created a ministerial duty.

II. THE REASONABLENESS OF A SEARCH UNDER THE FOURTH AMENDMENT IS NOT A RELEVANT INQUIRY IN EXAMINATION OF A QUALIFIED IMMUNITY DEFENSE.

The conflict perceived by Petitioners between the instant case and Bissonette v. Haig, 800 F.2d 812 (8th Cir. 1986)(en banc), aff'd, 485 U.S. 264 (1988), is likewise irrelevant. Petitioners argue that Bissonette requires looking to state law to determine the reasonableness of a warrantless search. Petitioners' Brief at 39-40. However, the determination of the reasonableness of a search had no relationship to the issue of qualified immunty in Bissonette nor does it have any relevance to determining the Respondents' immunity to suit in this case.

Bissonette involved a motion to dismiss for failure to state a claim. The question before the Eighth Circuit was whether the plaintiff-residents of Pine Ridge Indian Reservation had stated a claim under Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971), for a violation of the fourth amendment. Qualified immunity in a

Bivens action is coextensive with qualified immunity in a 42 U.S.C. §1983 action. See Butz v. Economou, 483 U.S. 478, 500-01 (1978). The Eighth Circuit in Bissonette made specific reference to the fact that the defendants had not yet answered or plead qualified immunity. The issue of whether the defendant-army officers were entitled to qualified immunity was not before the court but the court nonetheless acknowledged, "[t]here may be a qualified immunity defense here." 800 F.2d at 813.

The inquiry for purposes of qualified immunity in a fourth amendment case is not whether the official conducted an unreasonable search and seizure. This inquiry relates only to the underlying claim of a violation of the United States Constitution. The question for purposes of qualified immunity is a purely legal

question of whether the official's conduct violates clearly established statutory or constitional rights of which a reasonable person would have known. Since Bissonette did not concern qualified immunity it does not conflict with the instant case so as to warrant this Court's review.

CONCLUSION

For the preceding reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

LEE FISHER
Attorney General

RITA S. EPPLER
Chief, Federal
Litigation Section
Counsel of Record

NANCY J. MILLER
Deputy Chief Counsel

NANCY JOHNSTON
JACK W. DECKER
JERRY K. KASAI
Assistant Attorneys
General
30 East Broad Street,
17th Floor
Columbus, Ohio 43266-0410
(614) 644-5003

Counsel for Respondent
Pohlman

July 18, 1991

(4)

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IN THE

Supreme Court of the United States

October Term, 1990

ANTOINETTE RUSSO and MILDRED MALONEY,
Petitioners,

vs.

CARL MASSULLO, BEAVER TOWNSHIP, JOHN DOE 1-7, SCOTT POHLMAN, CARL FROST, RICK MARTIN and KEN FROST,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS CARL MASSULLO, BEAVER TOWNSHIP, JOHN DOE 1-7, CARL FROST, RICK MARTIN AND KEN FROST IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TODD M. RASKIN
Counsel of Record
JOHN T. MCLANDRICH
100 Franklin's Row
34305 Solon Road
Cleveland, Ohio 44139
(216) 248-7906
Attorney for Respondents
Carl Massullo, Beaver Township, John Doe 1-7, Carl Frost, Rick Martin and Ken Frost

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

QUESTIONS PRESENTED FOR REVIEW

1. Whether an alleged violation of a State Appellate Court injunction, which was contrary to the then existing and present state law, precludes entitlement to qualified immunity in an action brought pursuant to 42 USC Section 1983.

2. Whether any genuine issue of material fact precluded the Court of Appeals from affirming the grant of summary judgment regarding Plaintiff's allegation that a warrant was required to conduct the administrative inspection and seizure of the video draw poker machines.

3. Whether a State Appellate Court injunction, which is contrary to then existing and present state law, precludes a grant of summary judgment based on qualified immunity as to an allegation that an administrative search of a liquor permit holder's premises, which was conducted without a warrant, was in violation of the Fourth Amendment.

4. Whether Plaintiff failed to present sufficient evidence to establish the existence of a custom, policy or practice required to impose municipal liability.

PARTIES

Omitted under authority of Rule 29.1 of the Rules of the Supreme Court of the United States.

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No. 90-1928

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS CARL MASSULLO, BEAVER TOWNSHIP, JOHN DOE 1-7, CARL FROST, RICK MARTIN AND KEN FROST IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Respondent accepts Petitioner's statement regarding Opinions Below and incorporates by reference the Opinions Below appearing in the Appendix to Petitioner's Petition for Writ of Certiorari at pages A-1 through B-17, inclusive.

JURISDICTION

Respondents acknowledge that the United States Court of Appeals for the Sixth Circuit issued its Opinion and Judgment on March 5, 1991. On May 24, 1991 Petitioner filed with this Honorable Court an application for extension of time within which to file a Petition for Writ of Certiorari. On May 24, 1991 Justice Stevens signed an Order extending the time for Petitioner to file said Petition for Writ of Certiorari to and including June 13, 1991.

On June 13, 1991 Petitioner filed its Petition for Writ of Certiorari with this honorable Court.

These Respondents were served on June 26, 1991 with a copy of Petitioner's Petition for Writ of Certiorari. Respondents filed a Notice of Receipt of Service to evidence this date of service. Respondents timely Brief in Opposition follows.

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. Section 1254(1). Respondents acknowledge this Honorable Court has jurisdiction pursuant to 28 U.S.C. Section 1254(1) to review the decision of the United States Court of Appeals for the Sixth Circuit in this matter.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondents agree that 42 U.S.C. Section 1983 and the Fourth and Fourteenth Amendments are relevant to the matter at bar. However Respondents assert Ohio Revised Code Section 4301.10 which provides in pertinent part as follows is also relevant:

> "(A) the Department of Liquor Control shall:
>
> (4) enforce Chapters 4301 and 4303 of the Revised Code, and the Rules and Orders of the Board, the Director, and the penal laws relating to the manufacture, importation, transportation, distribution, and sale of beer and intoxicating liquor; . . .
>
> (6) inspect, upon demand, the books, accounts, records, memorandums, and place of business of any person subject to Chapters 4301 and 4303 of the Revised Code . . . .
>
> (7) Delegate to any of its agents or employees any power of investigation which the department possesses and the powers of police officers with respect to the enforcement of any of the penal laws relating to beer and to intoxicating liquor . . . ".

STATEMENT OF THE CASE

Respondents Carl Massullo, Beaver Township, John Does 1-7, Carl Frost, Rick Martin and Ken Frost, hereinafter the Beaver Township Defendants, wish to draw the attention of the Court to Petitioners continued reference to all Defendants below as Respondents without differentiation as to the conduct of Defendant Pohlman, as opposed to the conduct of the Beaver Township Defendants. As noted by the Court of Appeals for the Sixth Circuit in its decision, the Beaver Township Defendants are differently situated from a factual standpoint than Respondent/Defendant Scott Pohlman.

Respondent Pohlman is a liquor control agent for the Ohio Department of Liquor Control. The Beaver Township Defendants are police officers and the then acting police chief for Beaver Township. The John Does are assumed to be additional Ohio Department of Liquor Control Agents or Internal Revenue Agents.

Respondents also object to Petitioners continued citation to matters in their Petition for Writ of Certiorari which were not part of the record below.

In *Garono v. State,* 37 Ohio St. 3d (1988) the Ohio Supreme Court affirmed in part and reversed in part the injunction upon which Plaintiff places so much reliance. The Court in *Garono, supra,* wrote as follows:

> "To approve the injunction granted by the Trial Court would prevent the police from ever being able to seize, impound, or confiscate the appellees poker machines in the future if they were used in an unlawful manner. This would, in effect, give appellee a license to violate the law without fear of reprisal. For these reasons, we find that the injunction is improper in that it is too broad and thereby interferes with law enforcement." *Garono, supra* at 174.

The Ohio Supreme Court limited the injunction in *Garono* to reflect that video draw poker machines could be seized only when there is evidence the machines had been used in a manner so as to "establish, promote, or operate, or knowingly engage in conduct that facilitates any scheme or game of chance conducted for profit." (R.C. 2915.02(A)(2)(5)).

The Ohio Supreme Court in *Garono, supra* held, for the first time, that mere possession of video draw poker machines, which were held to be a gambling device *per se,* in *Mills-Jennings of Ohio, Inc. v. Ohio Department of Liquor Control,* 80 Ohio St. 2d 95 (1982) were not illegal absent additional evidence that the machines had been used in violation of Revised Code §2915.01, *et seq.* The Ohio Supreme Court held that mere possession of the video draw poker machines, although gambling devices *per se,* was not sufficient to establish criminal liability. The Court ruled that a further showing of the games being utilized in an effort to generate profit from gambling was a necessary element of the offense.

Petitioner points to the concession by the Ohio Department of Liquor Control in *Mills-Jennings of Ohio, supra,* to the effect that mere possession of the video draw poker machines was not a violation of the Ohio law. This statement is correct and in fact the Ohio Department of Liquor Control modified its policy subsequent to *Mills-Jennings of Ohio, supra* so that video draw poker machines would be seized by liquor control agents only upon a showing that the machines had been operated for profit. Therefore, the subsequent conduct of the Ohio Department of Liquor Control was consistent with the Ohio Supreme Court's eventual holding in *Garono, supra.*

Petitioner makes reference to an alleged stipulation that "seizure of the video games was wholly unnecessary for any proper law enforcement purpose." (Petition For

Certiorari at page 7.) This statement is unsupported by the record. A review of *Garono, supra* demonstrates there was no such stipulation. Rather the parties stipulated that no machine had been introduced into evidence, but instead expert testimony and representations of the machines had been introduced into evidence in lieu of the actual machine. No stipulations were made in the case at bar.

Petitioner states at page 8 of its Petition for Certiorari that respondent Massullo wrote a letter to the Department of Liquor Control "admittedly with no basis in fact.". A review of the record in the case at bar, demonstrates that this statement is unsupported by the record. The deposition testimony of Defendant Massullo reveals that the letter written to the Ohio Department of Liquor Control was based on anonymous telephone calls indicating that payoffs were being made at Petitioner's tavern. While a previous investigation by Beaver Township had revealed no illegal gambling, Defendant Massullo because of the Garono injunction felt it necessary to turn over the anonymous tips of the illegal payoffs to the Ohio Department of Liquor Control for their investigation.

In response to this letter from Defendant Massullo Respondent Pohlman, after being authorized by his superiors, began an investigation of Petitioner's tavern for evidence of payoffs on the video draw poker machines. Petitioner alleges that Pohlman's testimony regarding receiving payoffs was rebutted by his own records. This statement is clearly a distortion of the record. While the record reflects that Respondent Pohlman's records did not *confirm* the payoffs the records clearly did not refute evidence of a payoff. Pohlman testified to receiving payoffs.

Petitioner also states that Respondents Pohlman, Massullo, Frost, Martin and Frost met and agreed to conduct an armed raid on the Stagecoach Restaurant and

Lounge. This statement is also a complete distortion of the record. The record reflects that Respondent Massullo was approached by Respondent Pohlman and asked to meet with Respondent Pohlman and other liquor control agents and with agents of the Internal Revenue Service at the Youngstown FBI office. The record further shows that Respondent Massullo had no part in planning the raid on the Stagecoach Restaurant and Lounge and was only informed of the raid the day on which it was to occur. Respondents Frost, Martin and Frost had absolutely no part in the pre-raid preparation or planning. They were instructed by Defendant Massullo, on the day of the raid, to accompany the Ohio Department of Liquor Control agents into the Stagecoach Restaurant and Lounge for the purposes of providing security. Respondent Pohlman requested security from the Beaver Township Police Department due to his observation of weapons and fights inside the Stagecoach Restaurant and Lounge. Respondent Pohlman testified he saw weapons and fights inside of the Stagecoach Restaurant and Lounge during his investigation. On this basis the Beaver Township defendants accompanied the Ohio Department of Liquor Control agents into the Stagecoach Restaurant and Lounge for the sole purpose of providing security for the unarmed liquor control officers and Internal Revenue Agents.

On April 16, 1987 a raid was conducted by the Ohio Department of Liquor Control, with the Beaver Township Defendants acting as security, for the purpose of closing out the Ohio Department of Liquor Control's investigation of the Stagecoach Restaurant and Lounge. While Respondents acknowledge they had no warrant to conduct this raid Respondents assert that the Stagecoach Restaurant and Lounge as a public establishment engaged in the business of selling intoxicating liquor, which is recognized as a highly

regulated industry subject to government supervision, was subject to administrative searches and in fact was open to the public so that no warrant was necessary for entry.

Petitioner continues to make numerous allegations concerning the scope and manner of the search conducted by the Ohio Department of Liquor Control and as to the actions of the Beaver Township Defendants in providing security. While these issues of fact remain for litigation in the District Court these matters are not fact upon the record.

Petitioner at page 11 of its Petition for Certiorari states that Respondents seized the two video draw poker machines in violation of the Garono injunction. However, as the record clearly shows the seizure was made by the Ohio Department of Liquor Control and not by the Beaver Township Defendants. Further, based on Respondent Pohlman's statements that he received payoffs on the video draw poker machines the seizure of the machines was proper under the Garono injunction as affirmed by the Ohio Supreme Court.

Petitioner states at page 11 of its Petition for Certiorari that there was no evidence to support the criminal charges against Petitioners. However a review of the Judgment Entry dismissing the Complaints against Petitioners demonstrates that the failure to prove the profit element necessary for a violation was because two of the machines had been improperly marked and could not be admitted into evidence and that the third machine, although properly marked, was broken and could not be cleared, precluding a demonstration it was operated in violation of the law.

Therefore Petitioners' allegation that the lack of credibility as to Respondent Pohlman was the basis of the dismissal is without merit and is contrary to the record.

The Sixth Circuit Court of Appeals held, that as a pervasively regulated industry, no warrant was required to conduct an administrative search of the Stagecoach Restaurant and Lounge. However the Court ruled that the administrative search was subject to the Fourth Amendment's time, scope and manner restrictions, especially because no such restrictions were incorporated into the Ohio Revised Code or the Ohio Department of Liquor Control's administrative rules. The Court of Appeals ruled, that while no warrant was required, the scope and manner of the search must meet the requirements of the Fourth Amendment.

The Court ruled that as to Respondent Pohlman, who admittedly believed that more than mere possession of the gambling devices was required to establish liability, the question as to whether he knew his allegation of receiving payoffs was a falsehood was a question of fact not proper for resolution on a Motion for Summary Judgment. However the Court also ruled, as to the Beaver Township defendants, that they were entitled to rely upon Pohlman's assertion of receiving payoffs to establish probable cause for the seizure of the machines. The Court held that the question of whether the scope and manner of the search was reasonable under the Fourth Amendment was a question of fact. The Court held that Beaver Township Defendants could be liable under a "team rationale" theory for the actions of the Ohio Department of Liquor Control agents in their administration of the search.

Petitioner states at page 16 of its Petition for Certiorari that the Court of Appeals found that there was "sufficient evidence from which a jury could conclude that Respondent Massullo was the final and ultimate policy maker for Respondent Beaver Township, . . .". However, this statement is clearly a distortion of the record. The Sixth Circuit Court of Appeals held there

was "... some evidence from which a jury could reasonably conclude that Massullo could set policy" (Judgment Entry at page A-15).

Notwithstanding Petitioners' statements to the contrary Petitioners introduced absolutely no evidence as to the existence of any custom, policy or practice on behalf of Respondent Beaver Township. Rather Petitioner relies on attempting to establish Respondent Massullo's authority to set day to day policy and argues because Respondent Massullo can make policy any decision he makes is therefore policy.

SUMMARY OF ARGUMENT

1. The Sixth Circuit Court of Appeals has consistently held, and held in this case, that public officials are only entitled to qualified immunity when exercising discretionary decision making authority.

The opinion of the Court of Appeals below, and the cases cited by the Court in its Opinion, as well as other Sixth Circuit Court of Appeals cases, clearly demonstrate that the Sixth Circuit Court of Appeals does not hold that qualified immunity may be granted to a public official who is acting pursuant to a ministerial duty, as opposed to discretionary decision making. Petitioners' statements to the contrary in their Petition for Certiorari are clearly in error and are not the law of the Sixth Circuit.

The Mahoning County Court of Appeals injunction, which Petitioner alleges prohibited the seizure of the video draw poker machines, was contrary to the law of the Ohio Supreme Court both before and after *Garono v. State*. This injunction was invalid as being contrary to law.

2. The Sixth Circuit Court of Appeals held that a public official could be held to have violated "clearly established law" where he knew or reasonably should have known that the action he took violated the Plaintiff's constitutional rights, notwithstanding the lack of an authoritative decision to that effect by the United States Supreme Court, the Court of Appeals from that district, or the highest court for that state. The Court held that actual knowledge that the conduct violated the constitutional rights of the Plaintiff was a sufficient basis for liability notwithstanding the lack of such a definitive decision. The Beaver Township Defendants were entitled to rely upon the statements of Respondent Pohlman, an Ohio Department of Liquor Control agent, as to his receipt of payoffs in making their determination

to provide security to the Ohio Department of Liquor Control. Notwithstanding the innuendos attempted to be created by Petitioner at pages 34 and 35 of its Petition for Certiorari there is absolutely no evidence in the record that the Beaver Township Defendants knew or should have known that the statements made by Respondent Pohlman were falsehoods. A review of the record demonstrates a total lack of evidence that the Beaver Township Defendants knew Pohlman's statements to be false.

Petitioner failed to carry its burden under Rule 56 of the Federal Rules of Civil Procedure to present sufficient evidence to create a genuine issue of material fact. Petitioners' attempt to draw innuendos from language in the cases of *Garono v. State, supra* and *State v. Skalada,* Case No. 84-1976 (Youngstown Muni Ct 1984), unreported, are clearly not evidence admissible under Rule 56(e) of the Federal Rules of Civil Procedure and are insufficient to create a genuine issue of material fact warranting a denial of Defendant's Motion for Summary Judgment. Likewise this lack of evidence cannot be a basis for overruling the grant of Summary Judgment or the affirmation thereof by the Sixth Circuit Court of Appeals.

3. The Beaver Township Defendants did not conduct the search and seizure in the case at bar, but only provided security for the Ohio Department of Liquor Control agents.

Notwithstanding this fact the Sixth Circuit Court of Appeals held that the Beaver Township Defendants could be held liable if the scope of the search conducted by the Ohio Department of Liquor Control was unreasonable under a "team rationale" theory. The Sixth Circuit Court of Appeals noted the existence of the injunction goes to the appropriateness of the seizure and is not relevant as to whether the scope of the search itself was reasonable.

Defendants assert there is no conflict with *Bissonette v. Haig,* 800 F.2d 812 (8th Cir. 1986). *Bissonette* was a case appealing the granting of a Motion to Dismiss. The question in *Bissonette, supra* was whether a good cause of action had been stated. The Court of Appeals construing the right of privacy in light of the societal expectations and assumptions then in existence ruled that a good cause of action had been set forth. The reasonableness of the search and seizure are questions of fact which the Sixth Circuit Court of Appeals remanded to the District Court. Therefore, any issues relating to the reasonableness of the search are questions of fact for determination at trial.

4. Plaintiff failed to present evidence sufficient to create a genuine issue of material fact as to whether the conduct of Respondent Massullo constituted a municipal policy sufficient to impose liability on Respondent Beaver Township.

ARGUMENT

QUESTION FOR REVIEW NO. 1.: WHETHER AN ALLEGED VIOLATION OF A STATE APPELLATE COURT INJUNCTION, WHICH WAS CONTRARY TO THE THEN EXISTING AND PRESENT STATE LAW, PRECLUDES ENTITLEMENT TO QUALIFIED IMMUNITY IN AN ACTION BROUGHT PURSUANT TO 42 U.S.C. §1983.

Petitioner correctly cites to *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) as the general standard governing qualified immunity available to governmental officials in actions brought under 42 U.S.C. §1983. Pursuant to *Harlow, supra*, governmental officials "performing discretionary functions" are entitled to qualified immunity if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow, supra* at 818. The standard of *Harlow, supra* was refined in *Anderson v. Creighton*, 483 U.S. 635 (1987) where this Honorable Court held that in order to be "clearly established" a right must be "sufficiently particularized" so that a reasonable official would understand that what he is doing violates that right. *Anderson, supra.*

Petitioner attempts to create a conflict between the Circuit Courts of Appeal regarding whether qualified immunity can be extended to officials who are performing only ministerial acts as opposed to exercising discretionary decision making powers.

Respondents assert a resolution of this alleged conflict is not necessary to a ruling on the case at bar. Contrary to Petitioner's statements contained on pages 18 and 19 of the Petition for Certiorari the Sixth Circuit Court of Appeals does not hold that qualified immunity may be extended to an official who is performing a

ministerial duty. In fact the Sixth Circuit Court of Appeals in its decision in the case at bar wrote as follows:

> "Qualified immunity is available to officials performing discretionary functions unless the contours of the right that the governmental official allegedly violated were sufficiently clear that a reasonable official would have understood that what he is doing violates that right." Citation omitted (Opinion of the Sixth Circuit Court of Appeals appearing at page A-6 of the Appendix.)

In fact, the Sixth Circuit Court of Appeals held as early as 1971 in *Estate of Burke v. Ross,* 438 F.2d 230 (6th Cir. 1971) that persons performing ministerial duties are not entitled to qualified immunity. Most recently in *Boretti v. Wiscomb,* 20 S.C.R. 10, 1991 U.S. Appeals Lexis 6045 (6th Cir. 1991) the Sixth Circuit wrote as follows:

> "Complying with the doctor's prescription or treatment plan is a ministerial function, not a discretionary one. See *Estate of Burke v. Ross,* 438 F.2d 230, 235 (6th Cir. 1971) for this reason, we don't believe Defendant Wiscomb's Motion for Summary Judgment should be granted on the basis of qualified immunity."

Clearly the Sixth Circuit Court of Appeals has consistently held that qualified immunity is not available to those performing ministerial duties, but is only available to those performing discretionary decision making functions. Therefore, Petitioner's First Question for Review does not present a conflict between the Circuits and Petitioner's Petition for Writ of Certiorari should be denied.

In the case at bar Petitioner alleges that Defendants violated a ministerial duty by disobeying the injunction issued in *Garono v. State, supra.* However, as previously noted this injunction was issued by the Mahoning

County Court of Appeals and was contrary to the law of the State of Ohio as announced by the Ohio Supreme Court. Additionally, the injunction in *Garono, supra*, was affirmed in part and reversed in part by the Ohio Supreme Court. The injunction as narrowed by the Ohio Supreme Court was consistent with the actions of the Beaver Township Defendants in the case at bar.

Petitioners seek to rely on the proposition of law that an injunction must be obeyed until it is vacated by order of court. While Respondents acknowledge this general proposition of law, Respondents assert that said injunction did not constitute clearly established law, but rather was contrary to clearly established law at the time this cause of action arose. Respondents assert a state court injunction which is contrary to state law should not form the basis of a denial of qualified immunity premised on a federal civil rights claim.

Additionally, this Honorable Court ruled in *Worden v. Searls*, 121 U.S. 14 (1886) that where an injunction is unwarranted as a matter of law, sanctions for its violation cannot be upheld. Also in *State of Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1855) this Honorable Court ruled that an injunction violation cannot be enforced once the basis for the injunction is overruled.

Therefore, the Mahoning Court of Appeal's injunction being unwarranted as a matter of law, even at the time of its issue, cannot be enforced and should not be the basis of a denial of qualified immunity.

Respondents have a statutory duty in the State of Ohio to uphold the law of the State of Ohio. Respondents in the case at bar were effectively enjoined from upholding the law of the State of Ohio as it then existed. In fact, the Ohio Supreme Court in *Garono v. State* realized the inappropriateness of this injunction when it wrote as follows:

> "To approve the injunction granted by the trial court would prevent the police from ever being able to seize, impound, or confiscate the appellee's poker machines in the future if they were used in an unlawful manner. This would, in effect, give appellee a license to violate the law without fear of reprisal. For these reasons, we find the injunction is improper and that it is too broad and thereby interferes with law enforcement." *Garono, supra* at 174.

Respondent Massullo in the case at bar was not violating a ministerial duty, but rather was exercising his discretionary powers as acting chief of police which require him to enforce the laws of the State of Ohio.

Respondents assert the Sixth Circuit Court of Appeals correctly interpreted and applied the law of the State of Ohio and of the United States in holding that Respondents were entitled to qualified immunity. Further there is clearly no conflict between the circuits which would justify granting petitioner's Writ for Certiorari based on Question Presented for Review Number 1.

QUESTION FOR REVIEW NO. 2. WHETHER ANY GENUINE ISSUE OF MATERIAL FACT PRECLUDED THE COURT OF APPEALS FROM AFFIRMING THE GRANT OF SUMMARY JUDGMENT REGARDING PLAINTIFF'S ALLEGATION THAT A WARRANT WAS REQUIRED TO CONDUCT THE ADMINISTRATIVE INSPECTION AND SEIZURE OF THE VIDEO DRAW POKER MACHINES.

While Petitioner attempts to frame Question for Review No. 2 in terms of whether a governmental official who has actual knowledge he is violating a constitutional right is entitled to qualified immunity; Question for Review No. 2 is clearly not directed at that issue.

The Sixth Circuit Court of Appeals held that despite the absence of a definitive decision holding the alleged conduct unlawful that: "however, in the context of this case, Plaintiff's arguments persuade us that Pohlman could not reasonably have believed that the mere prsence of the draw poker machines inside a liquor establishment was enough to justify seizure of the machines and criminal charges." (Opinion of the Sixth Circuit at pages A-12, A-13.)

While in an appropriate case this Honorable Court may wish to decide what level of actual knowledge of illegality or belief of illegality is sufficient to strip a government official of qualified immunity, absent a definitive decision on point, Respondents submit the issue is not before this Honorable Court on appeal. Respondents have not appealed the Court of Appeals findings that Pohlman's alleged actual knowledge stripped him of qualified immunity. Absent an appeal by Respondent Pohlman on this issue Respondents assert the Sixth Circuit's holding that Pohlman's actual knowledge stripped him of qualified immunity renders Petitioner's Second Question for Review moot.

In reality Petitioner's Second Question for Review asks this Honorable Court to reweigh the facts as alleged by Petitioner. In the case at bar the Sixth Circuit Court of Appeals held that the Beaver Township Defendants were relying on the assertion of Respondent Pohlman as a law enforcement officer that an offense had occurred. Pursuant to this Honorable Court's ruling in *United States v. Hensley,* 469 U.S. 221 (1984) an officer of one law enforcement agency is entitled to rely upon the assertions and representations of a second law enforcement agency. Actions taken in reliance upon the information obtained from a second law enforcement agency, even if inaccurate, will not strip the official of qualified immunity absent actual knowledge of its falsity.

Petitioner's allegation of conflict between the circuits is not supported by any citation case law.

Viewing the conduct of the Beaver Township Defendants from the required objective view point demonstrates that the Beaver Township Defendants were entitled to qualified immunity.

Plaintiff attempts to create an issue of fact regarding whether the Beaver Township Defendants knew of any alleged falsity by Respondent Pohlman in his assertions of receiving a payoff. Petitioner at pages 34 and 35 of the Petition for Certiorari attempts to create an issue of material fact. However, a review of the matter set forth on pages 34 and 35 demonstrates there is no genuine issue of material fact regarding whether the Beaver Township Defendants knew that Respondent Pohlman's assertions were false. Even construing the information contained on pages 34 and 35 most strongly in Petitioner's favor demonstrates that these matters are not admissible under Rule 56(e) of the Federal Rules of Civil Procedure in opposition to a Motion for Summary Judgment. Further a review of the record demonstrates

that Petitioner submitted absolutely no evidence upon which a finding could be based that the Beaver Township Defendants knew that Respondent Pohlman was untruthful regarding the allegations of a payoff.

In fact, there has been no finding that Respondent Pohlman was untruthful regarding the allegation of a payoff.

Petitioner's allegation that the Sixth Circuit precluded the Plaintiff under the Doctrine of Qualified Immunity from presenting evidence to the jury regarding the fact that the Beaver Township Defendants knew Respondent Pohlman had lied regarding the allegation of payoffs is patently untrue. A review of the Sixth Circuit's Opinion demonstrates this falsity. Further, Petitioners presented absolutely no evidence admissible under Rule 56(e) of the Federal Rules of Civil Procedure which would create a genuine issue of material fact on this issue.

Therefore, as a matter of law and on the facts at bar, Petitioner's Second Question for Review should be answered against Petitioner. There is no conflict between the Circuits and no genuine issue of material fact as to the Beaver Township Defendants' knowledge regarding the assertion of a payoff.

QUESTION FOR REVIEW NO. 3. WHETHER A STATE APPELLATE COURT INJUNCTION, WHICH IS CONTRARY TO THE THEN EXISTING AND PRESENT STATE LAW, PRECLUDES A GRANT OF SUMMARY JUDGMENT BASED ON QUALIFIED IMMUNITY AS TO AN ALLEGATION THAT AN ADMINISTRATIVE SEARCH OF A LIQUOR PERMIT HOLDER'S PREMISES, WHICH WAS CONDUCTED WITHOUT A WARRANT, WAS IN VIOLATION OF THE FOURTH AMENDMENT.

Petitioner at page 37 of its Petition states that Respondents Massullo, Frost, Martin and Frost conducted the search and seizure in this case. However, the record demonstrates that Massullo, Frost, Martin and Frost only provided security for the Ohio Department of Liquor Control and the Internal Revenue Agents who actually conducted the search and seizure in this matter.

Notwithstanding this factual distinction Petitioner argues that the holding of the Sixth Circuit is in conflict with the holding of *Bissonette v. Haig,* 800 F.2d 812 (8th Cir. 1986). However, *Bissonette, supra,* was a case involving a Motion to Dismiss. As stated by the court in *Bissonette, supra,* "We have before us only the question whether the Complaint states a claim, and a complaint need not negative a qualified immunity defense." *Bissonette, supra* at 813, Citations omitted. The language quoted from *Bissonette* by Petitioner was used by the court in the context of deciding whether a claim for relief had been stated. The case of *Bissonette, supra,* has absolutely no relevance to the issue of qualified immunity as the case is not a qualified immunity case. The court in *Bissonette* ruled that the word "unreasonable" implies that the term is to be judged against what society understands to be unreasonable at the point in time. What is unreasonable is to be decided against a backdrop or matrix of societal expectations and

assumptions. Assuming *arguendo,* the correctness of the statement in *Bissonette,* Defendants assert that this language creates no conflict with the Sixth Circuit Court of Appeals ruling in this case. In the case at bar the Sixth Circuit Court of Appeals reversed the summary judgment as to whether the search conducted was reasonable. The Court held that the reasonableness of the search was a question of fact to be addressed at trial. The court further held that the Beaver Township Defendants, if the search was unreasonable, could be held liable for the unreasonable search pursuant to a "team rationale" theory. The court held that the Beaver Township Defendants, by not intervening, could be held liable for the allegedly unreasonable search conducted by the Ohio Department of Liquor Control.

Assuming *arguendo,* that the injunction would be relevant to whether the search was reasonable, such an issue is a question of fact to be addressed on remand by the District Court. Again while Defendants do not believe this injunction is relevant to the issue of reasonableness of the search, Defendants assert the issue is properly before the District Court on remand. The State Appellate Court injunction was clearly contrary to the law of the State of Ohio as it existed at that time and was partially reversed by the Ohio Supreme Court. The Sixth Circuit Court of Appeals did not refuse to take the injunction into consideration in construing the reasonableness of the search. The Sixth Circuit Court of Appeals ruled that the reasonableness of the search is a question of fact to be addressed at remand. Therefore, whether the injunction should or should not be considered in evaluating the reasonableness of the search has not be adjudicated and is not properly before this Honorable Court.

Petitioner's discussion of the warrant requirement does not appear directed at the entry into the Stagecoach Restaurant and Lounge which was held

lawful by the Sixth Circuit Court of Appeals as an administrative inspection of a liquor establishment pursuant to *Colonade Catering Corp. v. United States*, 397 U.S. 72 (1970). However, Petitioner seems to allege that the scope of the search was unreasonable and that its duration was unreasonable. As previously stated the Sixth Circuit Court of Appeals has held that these are issues of fact proper for the District Court's consideration on remand.

Therefore, Respondents assert that Question for Review No. 3 should be answered adversely to the Petitioner and that issues relating to the reasonableness of the search are properly issues for trial on remand as held by the Sixth Circuit Court of Appeals. Therefore, Petitioner's Petition for Certiorari should be denied as to this issue.

QUESTION FOR REVIEW NO. 4. WHETHER PLAINTIFF FAILED TO PRESENT SUFFICIENT EVIDENCE TO ESTABLISH THE EXISTENCE OF A CUSTOM, POLICY OR PRACTICE REQUIRED TO IMPOSE MUNICIPAL LIABILITY.

Petitioner at pages 43 and 44 of its Petition for Certiorari states: "In this case United States Court of Appeals for the Sixth Circuit explicitly held that Petitioners had presented sufficient evidence that Respondent Massullo, acting chief of police of Respondent Beaver Townships, was the final policy maker of the township." (Petition for Certiorari at pages 43 and 44.) However, contrary to Petitioner's statement the United States Court of Appeals for the Sixth Circuit held in this case: "Based on Massullo's testimony that he had final control over day-to-day police matters and that he sometimes made policy without submitting his decisions to the township Board of Trustees, there is some evidence from which a jury could reasonably conclude Massullo could set policy." (Opinion of the Sixth Circuit at page A-15, emphasis added.)

Clearly the Sixth Circuit Court of Appeals did not hold that sufficient evidence had been presented to find that Defendant Massullo was the final policy maker of the Township.

Assuming *arguendo* that Defendant Massullo was the final policy maker on certain issues Petitioner's argument is essentially that as the final policy maker any action or decision that Defendant Massullo made was municipal policy. Respondents assert that *Pembauer v. City of Cincinnati,* 475 U.S. 469 (1986) cannot be read so broadly. As stated by this Honorable Court in *Pembauer, supra*: "We hold that municipal liability under Section 1983 attaches where—and only where—a deliberate choice to follow a course of action is made among various alternatives by the official or officials

responsible for establishing final policy with respect to the subject matter in question. *Pembauer, supra* at 483-484.

The court in *Pembauer* clearly held that not every action of the municipal policy maker is municipal policy.

In the case at bar the Sixth Circuit Court of Appeals held, as did District Court that Petitioner had failed to submit sufficient evidence to demonstrate the existence of a custom, policy or practice on behalf of defendant Beaver Township. As noted by the Sixth Circuit Court of Appeals: "In this case Plaintiffs have failed to even articulate what they perceive to be deliberate and discernable policy, much less offer evidence to establish the existence of such policy." (Opinion of the Sixth Circuit Court of Appeals at page A-15.)

Pursuant to *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986) a party opposing a Motion for Summary Judgment has the burden of creating a genuine issue of material fact by submitting evidence admissible pursuant to Rule 56(e) of the Federal Rules of Civil Procedure such that a reasonable jury could find in favor of the non-moving party. In the case at bar Petitioner has failed to submit any evidence in support of its allegation of the existence of a custom, policy or practice. (*Celotex, supra* at 322-323.)

The record demonstrates that Petitioner has failed to submit any evidence of a municipal custom, policy or practice. Pursuant to *Celotex, supra* and *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1985), a plaintiff may not defeat a properly supported Motion for Summary Judgment without offering evidence from which a reasonable jury could find a verdict in his favor.

In the case at bar Petitioner's argument would result in *Pembauer* being a rule of absolute liability so that any action by a policy maker would be automatically an official custom, policy or practice resulting in liability.

Further, in the case at bar an application of this rule would result in vicarious liability for the municipality in violation of *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1977) where this Honorable Court declined to impose *Respondeat Superior* liability on a municipality. An application of the rule advanced by Petitioner would result in a municipality being vicariously liable for the actions of the liquor control agents who conducted the search. Pursuant to the Sixth Circuit Court of Appeals ruling the Beaver Township Defendants may be liable under a "team rationale" theory for the actions of the Ohio Department of Liquor Control agents if their search was unreasonable and exceeded the bounds of the Fourth Amendment. While such a team rationale approach may have validity as to individual officers if they witnessed and did not intervene so as to prevent a constitutional violation such a "team rationale" theory has no application to a municipal defendant. If liability is to be imposed upon the Beaver Township Defendants based on a "team rationale" then any imposition of liability on the municipal defendant is clearly vicarious liability akin to *Respondeat Superior*. Such an approach was rejected by this Honorable Court in *Monell, supra*.

Therefore, Respondents assert that Petitioner failed to submit sufficient evidence to allow a reasonable jury to find the existence of a custom, policy or practice upon which municipal liability can be based. Further, Respondents assert that to impose liability against Defendant Beaver Township on the record before the Court is akin to *Respondeat Superior* liability. Respondents assert the "team rationale" theory has no application to a municipal defendant.

Therefore, Respondents assert that petitioner's Fourth Question Presented for Review should be answered against Petitioner and that Petitioner's Petition for Writ of Certiorari should be denied.

CONCLUSION

Based upon the foregoing arguments and authorities Respondents assert that Petitioner's Petition for Writ of Certiorari should be denied and that the judgment of the Sixth Circuit Court of Appeals should be affirmed in its entirety.

Respectfully submitted,

TODD M. RASKIN
Counsel of Record
JOHN T. MCLANDRICH
100 Franklin's Row
34305 Solon Road
Cleveland, Ohio 44139
(216) 248-7906
Attorney for Respondents
Carl Massullo, Beaver Township,
John Doe 1-7, Carl Frost,
Rick Martin and Ken Frost